

BIENNIAL REPORT
OF THE
ATTORNEY GENERAL
TO THE
GOVERNOR OF THE STATE OF ALABAMA
FOR THE PERIOD
FROM OCTOBER 1, 1928
TO SEPTEMBER 30, 1930

CHARLIE C. McCALL.....	<i>Attorney General</i>
JUDGE A. A. EVANS.....	<i>First Assistant Attorney General</i>
JOHN J. HAYNES.....	<i>Assistant Attorney General</i>
MERWIN T. KOONCE.....	<i>Assistant Attorney General</i>
LUTHER PATRICK.....	<i>Assistant Attorney General</i>
JAMES L. SCREWS.....	<i>Assistant Attorney General</i>

J. W. BRASSELL.....	<i>Special Assistant Attorney General</i>
	(To Alabama Public Service Commission)
WILLARD McCALL.....	<i>Special Assistant Attorney General</i>
	(On Collection Delinquent Taxes, etc.)
WM. P. COBB.....	<i>Special Assistant Attorney General</i>
R. T. GOODWYN, JR.....	<i>Special Assistant Attorney General</i>

JUDGE J. Q. SMITH.....	<i>Special Assistant Attorney General</i>
	(To Alabama Public Service Commission)
	(Resigned 1930)
W. M. RAYBURN.....	<i>Assistant attorney General</i>
	(Resigned 1929)
THOS. E. KNIGHT, Jr.....	<i>Assistant Attorney General</i>
	(Resigned 1929)

MRS. LORRAINE T. MOORE.....	<i>Chief of Personnel</i>
MRS. ALICE KENT BALDWIN.....	<i>Chief Clerk and Secretary</i>
MISS NELL M. JOHNSON.....	<i>Stenographer</i>
MRS. J. W. KIGHT.....	<i>Stenographer</i>
MISS MILDRED LYONS.....	<i>Stenographer</i>
MRS. NELL C. McCALL.....	<i>Clerk, State Board of Pardons</i>
H. B. REID.....	<i>Chief Investigator</i>

THE WILSON PRINTING COMPANY
STATE PRINTERS AND BINDERS
MONTGOMERY, ALABAMA

ATTORNEYS GENERAL OF ALABAMA

1819-1928

Henry Hitchcock.....	1819
Thomas White.....	1823
Constantine Perkins.....	1825
Peter Martin.....	1832
Alexander B. Meek.....	1836
John D. Pelham.....	1836
Lincoln Clarke.....	1838
Matthew Lindsay.....	1839
Thomas D. Clarke.....	1843
William H. Martin.....	1847
Marion A. Baldwin.....	1850
John W. A. Sanford.....	1865
Joshua Morse.....	1868
John W. A. Sanford.....	1870
Benjamin Gardner.....	1872
John W. A. Sanford.....	1874
Henry C. Tompkins.....	1878
Thomas N. McClellan.....	1884
William L. Martin.....	1889
William C. Fitts.....	1894
Charles G. Brown.....	1898
Massey Wilson.....	1903
Alexander M. Garber.....	1907
Robert C. Brickell.....	1911
William L. Martin, Jr.....	1915
F. Loyd Tate.....	1918
Emmett S. Thigpen.....	1918
J. Q. Smith.....	1919
Harwell G. Davis.....	1921
Charlie C. McCall.....	1927

Note: For many years, and until Feb. 20, 1866, the law required the Attorney General to act as solicitor for the circuit in which the seat of government was located.

LIST OF CIRCUIT JUDGES AND SOLICITORS

1st Circuit—Choctaw, Washington and Clarke Counties. Judge T. J. Bedsole, Grove Hill; Solicitor Joe M. Pelham, Jr., Chatom.

2nd Circuit—Butler, Crenshaw and Lowndes Counties. Judge A. E. Gamble, Greenville; Solicitor Calvin Poole, Greenville.

3rd Circuit—Barbour, Bullock, Dale and Russell Counties. Judge J. S. Williams, Clayton; Solicitor T. M. Patterson, Clayton.

4th Circuit—Bibb, Dallas, Hale, Perry and Wilcox Counties. Judge Thomas E. Knight, Selma; Solicitor Jos. H. James, Greensboro.

5th Circuit—Chambers, Macon, Randolph, Tallapoosa and Lee Counties. Judge S. L. Brewer, Opelika; Judge W. P. Bowling, LaFayette; Solicitor C. H. Vann, Roanoke.

6th Circuit—Tuscaloosa County. Judge Henry B. Foster, Tuscaloosa; Solicitor Ed deGraffenreid, Tuscaloosa.

7th Circuit—Calhoun, Cleburne and Talladega Counties. Judge R. B. Carr, Anniston; Solicitor J. B. Sanford, Talladega; Judge W. B. Merrill, Heflin.

8th Circuit—Cullman, Lawrence, Limestone and Morgan Counties. Judge James E. Horton, Athens; Judge W. W. Callahan, Decatur; Solicitor W. E. James, Cullman.

9th Circuit—Cherokee, DeKalb, Marshall and Jackson Counties. Judge A. E. Hawkins, Fort Payne; Solicitor H. G. Bailey, Boaz.

10th Circuit—Jefferson County. Judge Richard V. Evans, Birmingham; Judge C. B. Smith, Birmingham; Judge H. P. Heflin, Birmingham; Judge Romaine Boyd, Birmingham; Judge Joe C. Hail, Birmingham; Judge Roger Snyder; Judge Gardner Goodwyn, Bessemer; Judge John Denson; Judge John P. McCoy, Birmingham; Judge William Walker, Birmingham; Judge J. Russell McElroy, Birmingham; Solicitor George Lewis Bailes, Birmingham; Assistant Solicitor Ben G. Perry, Bessemer.

11th Circuit—Colbert, Franklín and Lauderdale Counties, Judge J. Fred Johnson, Florence; Solicitor R. T. Simpson, Jr., Florence.

12th Circuit—Coffee and Pike Counties. Judge W. L. Parks, Troy; Solicitor J. M. Loflin, Enterprise.

13th Circuit—Mobile County. Judge Alex T. Howard, Mobile; Judge Joel W. Goldsby, Mobile; Judge Claude A. Grayson, Mobile; Solicitor Bart B. Chamberlain, Mobile.

14th Circuit—Walker, Winston, Fayette, Lamar and Marion Counties. Judge R. L. Blanton, Jasper; Judge Ernest Lacy, Jasper; Solicitor B. G. Wilson, Jasper.

15th Circuit—Montgomery County. Judge Leon McCord, Montgomery; Judge Walter B. Jones, Montgomery; Solicitor W. T. Seibels, Montgomery.

16th Circuit—Blount, Etowah and St. Clair Counties. Judge O. A. Steele, Oneonta; Judge Woodson J. Martin, Gadsden; Solicitor W. G. Rains, Gadsden.

17th Circuit—Marengo, Greene, Pickens and Sumter Counties. Judge Ben F. Elmore, Demopolis; Solicitor George O. Miller, Livingston.

18th Circuit—Clay, Shelby and Coosa Counties. Judge E. P. Gay, Lineville; Solicitor A. L. Hardagree, Ashland.

19th Circuit—Autauga, Chilton and Elmore Counties. Judge George F. Smoot, Wetumpka; Solicitor Winston Huddleston, Wetumpka.

20th Circuit—Geneva, Henry and Houston Counties. Judge H. A. Pearce, Dothan; Solicitor J. N. Mullins, Dothan.

21st Circuit—Baldwin, Conecuh, Escambia and Monroe Counties. Judge F. W. Hare, Monroeville; Solicitor Leonard S. Biggs, Monroeville.

22nd Circuit—Covington County. Judge Emmett S. Thigpen, Andalusia; Solicitor Robert S. Reid, Andalusia.

23rd Circuit—Madison County. Judge Paul Speake, Huntsville; Solicitor James H. Pride, Huntsville.

**LETTER TRANSMITTING REPORT OF THE ATTORNEY GENERAL
TO HIS EXCELLENCY, BIBB GRAVES, GOVERNOR OF
ALABAMA**

To His Excellency,
Bibb Graves,
Governor of Alabama.

I have the honor to submit for your consideration the Biennial Report of the Attorney General of Alabama covering the period beginning with October 1, 1928, and ending with September 30, 1930, pursuant to subsection 5 of Section 853, Code of Alabama, 1923, with certain suggestions which I believe if followed, will tend to the suppression of crime and the improvement of the administration of justice, and with additional suggestions concerning the revenue of the State and reorganization of certain State activities.

CRIMINAL STATISTICS

The criminal statistics furnished in the reports of the various solicitors throughout the State are being prepared in the manner prescribed by law, and will appear in the report as finally compiled.

**RECORD IN THE COURT OF APPEALS AND
SUPREME COURT OF STATE**

Under the law the Attorney General is the Chief Law Officer of the State, and represents the State in all criminal proceedings before the Court of Appeals and the Supreme Court, and also represents the State wherever it is a party in interest in any civil proceedings.

During the biennial period just closed, the Attorney General's office handled twelve hundred ten (1210) criminal appeals before the Court of Appeals and the Supreme Court of Alabama. Of this number seven hundred twenty-seven (727) were affirmed, two hundred nineteen (219) were reversed, and two hundred sixty-four (264) were dismissed.

These figures show the largest number of criminal cases handled in a biennial period by the Attorney General's office before these Appellate Courts *in the history of the State*. There were twenty-seven (27) more affirmances and forty-nine (49) more dismissals secured during this biennial period (1928-30) than were secured during the last biennial period, (1926-28).

During the period of time now under consideration, the Attorney General's office handled one thousand forty-five (1045) criminal cases before the *Court of Appeals*, of which number, five hundred eighty-eight (588) were affirmed, two hundred fifty-two (252) were dismissed, and two hundred five (205) were reversed. In the *Supreme Court of Alabama* the Attorney General's office handled one hundred sixty-five (165) criminal appeals, of which number one hundred thirty-nine (139) were affirmed, fourteen (14) were reversed and twelve (12) were dismissed.

During this last biennial period of my administration as Attorney

General of Alabama the *percentage of reversals in criminal appellate work was only eighteen (18) per cent.* During the first biennial period of my administration, the percentage of reversals in criminal appellate work was only nineteen and seven-teenth (19.7) per cent. *Only once in the history of the State has there been a lower percentage and that was in 1915-16, when there were only five hundred fifty (550) appealed cases, or less than one-half as many as were handled by this office during the same period of time, and even then the record was only 16.9 per cent.* I am happy to inform you that, *for the full four years of my administration as Attorney General, the percentage of reversals of criminal appeals before the Supreme Court and Court of Appeals of Alabama is the lowest in the history of the State.* In the administration of my immediate predecessor, in the biennial period 1922-24 the percentage of reversals was 23.4 per cent, and in 1924-26 his percentage of reversals was 20.5. Immediately following is set forth the statistical data on criminal appellate work since 1885.

CRIMINAL APPEALS TO THE SUPREME COURT AND THE COURT OF APPEALS SINCE 1885

1885-86, 148 appeals, 90 affirmed or dismissed, 58 reversed. Percentage of reversals, 39.

1887-88, 117 appeals, 72 affirmed or dismissed, 45 reversed. Percentage of reversals, 38.

1889-90, 189 appeals, 110 affirmed or dismissed, 79 reversed. Percentage of reversals, 42.

1891-92, 185 appeals, 112 affirmed or dismissed, 73 reversed. Percentage of reversals, 39.

1893-94, 230 appeals, 124 affirmed or dismissed, 106 reversed. Percentage of reversals, 46.

1895-96, 263 appeals, 158 affirmed or dismissed, 105 reversed. Percentage of reversals, 46.

1897-98, 231 appeals, 150 affirmed or dismissed, 81 reversed. Percentage of reversals, 35.

1899-1900, 189 appeals, 134 affirmed or dismissed, 55 reversed. Percentage of reversals, 28.

1901-02, 225 appeals, 163 affirmed or dismissed, 30 reversed. Percentage of reversals, 28.

1903-04, 253 appeals, 164 affirmed or dismissed, 89 reversed. Percentage of reversals, 35.

1905-06, 292 appeals, 184 affirmed or dismissed, 108 reversed. Percentage of reversals, 36.

1907-08, 314 appeals, 209 affirmed or dismissed, 105 reversed. Percentage of reversals, 33.

1909-10, 280 appeals, 162 affirmed or dismissed, 124 reversed. Percentage of reversals, 43.

1911-12, 469 appeals, 335 affirmed or dismissed, 134 reversed. Percentage of reversals, 28.5

1913-14, 579 appeals, 460 affirmed or dismissed, 119 reversed. Percentage of reversals, 20.5

1915-16, 550 appeals, 457 affirmed or dismissed, 93 reversed. Percentage of reversals, 16.9.

1916-18, 506 appeals, 386 affirmed or dismissed, 120 reversed. Percentage of reversals, 23.7.

1918-20, 420 appeals, 291 affirmed or dismissed, 129 reversed. Percentage of reversals, 30.7.

1920-22, 685 appeals, 507 affirmed or dismissed, 178 reversed. Percentage of reversals, 25.9.

1922-24, 868 appeals, 664 affirmed or dismissed, 204 reversed. Percentage of reversals, 23.4.

1924-26, 1094 appeals, 869 affirmed or dismissed, 225 reversed. Percentage of reversals, 20.5.

1926-28, 1140 appeals, 915 affirmed or dismissed, 225 reversed. Percentage of reversals, 19.7.

1928-30, 1210 appeals, 991 affirmed or dismissed, 219 reversed. Percentage of reversals, 18.

These figures do not include civil cases.

Your attention is invited to the fact that *the percentage of reversals has constantly decreased during the last ten years*. A large contribution to the record of reversals during my tenure of office was Your Excellency permitting me additional professional and clerical assistants, and the wisdom of the legislature in recognizing the increase of the volume of work. To the untiring efforts of Assistant Attorney General J. W. Brassell, Wm. P. Cobb and Merwin T. Koonce, who handled criminal appeals during this period of time, is due the credit for this splendid record.

ADVISORY OPINIONS

In the Biennial Report of 1926-28, I discussed the powers, functions and duties of the Attorney General of Alabama and showed the particular duties with regard to the rendition of opinions to State and County officers. In 1926-28 this office rendered approximately 1,317 official opinions, and, in addition, rendered several hundred unofficial opinions to parties throughout the State. During the biennial period of 1928-30 the Attorney General's office has rendered over 1,800 official opinions and has replied, in an unofficial way, to many thousands of inquiries concerning the laws of the State. The work of rendering official opinions has grown constantly since the legislature imposed the duty upon this office to advise county officers throughout the State.

When one considers the fact that the rendition of an official opinion construing the law involves considerable study in each instance, and great care in the preparation thereof, one may readily realize the tremendous task accomplished by the small force provided, and it is interesting to note that out of the vast number of official opinions this office rendered during the period 1928-30, not more than twenty have been overruled by the courts of the State. In many instances, many of them have been tested in the courts and the overwhelming percentage have been upheld. In subse-

quent pages of this report I have set forth a number of these official opinions, which, in my judgment, after conference with all of my Assistants, I deem of particular value to State, county and other officials, and I sincerely trust that this presentation of these opinions in printed form, with the index provided therefor, may be of value to the public officials throughout Alabama.

THE ATTORNEY GENERAL—POWERS, FUNCTIONS AND DUTIES OF

In addition to his regular duties, the Attorney General is, by statute, a member of several boards and commissions, among which are:

The State Pension Board.

Commission on Public Buildings and Grounds.

The State Memorial Commission.

The Highway Bonding Commission.

The Budget Commission.

The State Board of Compromise.

The Attorney General receives no extra compensation for his services on any board or commission. The salary of the Attorney General is the same today that it was when I assumed office.

All data with regard to the above mentioned boards and commissions is not made a part of this report, inasmuch as each such board or commission makes a separate report to the Governor.

BOARD OF PARDONS

In Section 124, Constitution of Alabama, 1901, the Board of Pardons is created, consisting of the Attorney General, Secretary of State and State Auditor, and its powers, functions and duties are prescribed in the Constitution. In the Biennial Report for 1926-28, I commented at length on this Board and made certain recommendations as to needed legislation pertaining thereto and I here again renew these recommendations. To my way of thinking it is absolutely imperative that there be some legislation to bring the affairs of this Board out of chaos. Furthermore, I believe the Constitution should be amended so as to make the recommendations of the Board of Pardons of more effect. I do not believe the Governor should be permitted to grant paroles and commutations of sentences in felony cases except on the recommendation of the board of pardons, and I believe the Constitution should be changed to effectuate this. Likewise, I believe there should be some legislation with regard to the granting of temporary paroles.

As Chairman of the Board of Pardons the regular clerical force of the Attorney General's office has handled all the files in cases coming before said Board. It has prepared all the records and carried on all the correspondence of said Board in relation to cases before it. No extra clerks have been employed for this purpose, but the work has been done by two

members of the regular force, viz. Mrs. Kight and Mrs. McCall, who have handled it with extraordinary efficiency.

The Board of Pardons has considered the following number of cases during the biennial period:

1928-29	995
1929-30	916
TOTAL 1928-30	1,911

This shows that there were 226 more applications which came before the Pardon Board during this biennial period than during the period of 1926-28.

The correspondence, filing and preparation of all matters pertaining to these cases, so far as this office has been concerned, has been done by Mrs. McCall.

In addition, the Pardon Board has passed upon the following indeterminate cases during this period:

1928-29	1,016
1929-30	1,517
TOTAL 1928-30	2,533

These figures show that there were 969 more indeterminate sentence cases coming before the Pardon Board during this biennial period than during the period 1926-28. The correspondence, filing and preparation of same was handled by Mrs. Kight.

It will be noted, therefore, that in addition to carrying on the correspondence for the Board of Pardons, preserving the files and preparing the records in these cases, the Attorney General, during the biennial period 1928-30 has passed upon 4,444 pardon, parole, and commutation matters, coming before said Board, and this is, within itself, a tremendous task.

APPLICATIONS FOR PATENTS TO SIXTEENTH SECTION LANDS

During this biennial period there have been twenty-three patents issued. Four applications for patents were heard by the Board of Compromise during this time. The Attorney General has passed upon all applications for patents to State lands, and Hon. Merwin T. Koonce, Assistant Attorney General, who has handled this particular phase of the work of the office, has accomplished it in a most satisfactory manner.

ABSTRACTS EXAMINED IN ADDITION TO PATENT APPLICATIONS

There were forty-five abstracts examined by the Attorney General's office with reference to school property and property purchased by the State of Alabama.

STATE BOARD OF COMPROMISE

This Board is a creature of statute and passed upon certain doubtful claims. It keeps a docket of this work in the office of the Attorney General, and this docket is open to public inspection.

LEGAL ADVISOR TO ALABAMA PUBLIC SERVICE COMMISSION

The Attorney General is Legal Advisor to this Commission and by statute is given a Special Assistant Attorney General paid from the funds of said commission, with definite duties to be performed for it under his direction. The Report of 1926-28 deals with certain litigation handled during *that* period of time, and on the following pages are set forth some of the more important matters that have been handled during the biennial period 1928-30.

I was extremely fortunate in being able to obtain the services of Hon. J. Q. Smith, former Attorney General of Alabama, in this position, and he filled it with great efficiency during the time he was connected with the office. He resigned in the early part of 1930, whereupon, with the approval of the Governor and the Commission, I appointed Hon. J. W. Brassell to fill this place, and his work has been very satisfactory in every respect.

The following is a statement of some of the more important matters that have been handled during this period:

"Pursuant to your request I am herewith submitting to you a brief summary and status of cases handled by me as Special Assistant Attorney General to the Alabama Public Service Commission since my appointment April 1, 1927, up to and including April 1, 1930, which are as follows:

Southern Railway Company,
A Corporation,
Complainant.

V.

Alabama Public Service
Commission,
Respondent.

In the Circuit Court of
Montgomery County
In Equity

This is a case made by bill in equity for injunction to restrain the Alabama Public Service Commission from enforcing its orders with reference to the repairs and extensions to the railroad company's freight depot in the Town of Greensboro, Alabama.

This case was pending at the time I became Attorney for the Commission, and has been by me settled and dismissed by the Complainant, the repairs and extensions ordered by the Commission having been made in accordance with the Commission's orders, and to the satisfaction of the people of the Town of Greensboro, Alabama.

Southern Railway Company,
A Corporation,
Complainant.

In the Circuit Court of
Montgomery County
In Equity

V.

Alabama Public Service
Commission,
Respondents.

This case was made by bill in equity for injunction to restrain the Alabama Public Service Commission from enforcing its orders with reference to repairs and extensions to the railroad company's passenger depot in the Town of York, Alabama.

This case was pending at the time I became Attorney for the Commission, and has been by me settled and dismissed by the Complainant, the repairs and extensions ordered by them having been made in accordance with the Commission's orders, and to the satisfaction of the people of the Town of York, Alabama.

Southern Railway Company,
A Corporation,
Complainant.

In the Circuit Court of
Montgomery County
In Equity

V.

Alabama Public Service
Commission,
Respondents.

This is a case made by bill in equity for injunction to restrain the Alabama Public Service Commission from enforcing its orders requiring said railroad company to build a new passenger station in the City of Huntsville, Alabama. The bill for injunction was filed July 1, 1927, and after formal pleading the case was tried on its merits before Hon. Walter B. Jones, Circuit Judge, sitting in equity, and on July 26, 1928, said Judge entered a final decree making the injunction permanent, thereby restraining the Alabama Public Service Commission from enforcing or attempting to enforce said orders, and from seeking to recover any penalties, forfeitures or fines imposed by statutes of Alabama for a failure to comply with the orders of said Commission.

During the pendency of this litigation, the Southern Railway Company, complainant, proceeded to make extensive repairs and improvements to its old passenger station, sheds and grounds, expending the sum of six thousand dollars in said repairs, extensions and improvements, thereby making said passenger station adequate, comfortable and sanitary, thereby giving the people of Huntsville adequate depot facilities.

It was my opinion that after said railway company made the repairs and improvements above referred to, that the case could not be reversed on appeal to the Supreme Court of Alabama, therefore no appeal was taken on behalf of the Alabama Public Service Commission.

Alabama Public Service
Commission,
Complainant.

V.

St. Louis-San Francisco Railway
Company, a Corporation,
Respondents.

In the Circuit Court of
Montgomery County
In Equity

This case was made by bill in equity by the Alabama Public Service Commission, praying for the injunction to restrain the St. Louis-San Francisco Railway Company from building a new combined passenger and freight depot in the Town of Atmore, Alabama, without first having applied for and obtained a permit from the Alabama Public Service Commission as provided for by the statutes of Alabama. The temporary restraining order was issued by Hon. Leon McCord, Circuit Judge on August 9, 1928, and in compliance with said restraining order so issued, the railway company promptly ceased work on said combined passenger and freight depot.

The St. Louis-San Francisco Railway Company has, since this injunction was issued, built a depot which is satisfactory to the people of Atmore and the Alabama Public Service Commission. The case has been dismissed.

State of Alabama and Alabama
Public Service Commission,
Complainants.

V.

The United States of America, At-
lantic Coast Line Railroad Co.,
Seaboard Air Line Railway Co.,
et al.

In the Supreme Court of the
United States, on appeal from the
District Court of the United States
for the Northern District of Ala-
bama.

This case is made by the Alabama Public Service Commission who filed a bill in equity in the United States District Court for the Northern District of Alabama on December 23, 1927, seeking to set aside orders of the Interstate Commerce Commission and to enjoin various railroads from seeking to file and make effective tariffs in accordance with said orders on fertilizer and fertilizer materials hauled in intrastate traffic in Alabama, which would make a large increase in freight rates on fertilizer and fertilizer material hauled in intrastate traffic in Alabama.

The United States answered the bill, and the Interstate Commerce Commission intervened as a party defendant, and the various railroads made party defendants answered said bill.

Three judges, two circuit and one district judge, heard the case in New Orleans, La., and without writing any opinion denied an injunction, an appeal has been taken to the Supreme Court of the United States from such order denying, after notice and hearing, the interlocutory injunctions prayed for. The record has been printed and filed in the Supreme Court

of the United States according to the rules of said Court, and will be set down for argument on some date in the future.

This case was remanded to the three Judge Court to be reconsidered by the Court on its merit and final decree. The case is now pending.

St. Louis-San Francisco Railway
Company, a Corporation,
Complainant.

V.

Alabama Public Service
Commission,
Respondents.

In the Supreme Court of the
United States on appeal from the
United States District Court for
the Middle District of Alabama.

This case was made by bill in equity praying for an injunction against the Alabama Public Service Commission by St. Louis-San Francisco Railway Company, seeking to enjoin said Commission from enforcing any penalties and forfeitures against said railway company for discontinuing two of its passenger trains heretofore running and serving stations on their line of railroad between Carbon Hill, Alabama, and Amory, Mississippi, without first having filed request and getting permission of the said Alabama Public Service Commission in violation of Section 9713 of the Code of Alabama, 1923. This case was set for trial and heard at New Orleans, La., on July 25, 1928, by one Circuit Judge and two District Judges. After argument being heard and briefs submitted, the Court on August 17, 1928, handed down its opinion and decree, in which said Court denied the interlocutory injunction prayed for by complainant.

Within the time allowed by law complainant gave notice of appeal to the Supreme Court of the United States, which was allowed by the Court. The temporary injunction was reinstated upon the giving of a \$16,000 bond payable to the State of Alabama. This case is now pending on appeal.

This case was decided in favor of the State on the main question involved, but case was remanded back to the lower court for further decree, and is now pending.

State of Alabama

V.

J. L. Tanner, C. J. Balow,
J. R. Smith, E. D. Pointer,
J. F. Roberts, J. F. Hill,
Arthur House, A. Z. Cooper,
Forest Borders and G. D. Horton.

In the Circuit Court of
Jefferson County
In Equity

This case was on appeal from an order of the Alabama Public Service Commission, and taken under Section 42 of the Alabama Motor Carrier Act of 1927. These defendants were cited by the Alabama Public Service Commission to show cause why they should not be construed as motor carriers within the meaning of the Motor Carrier Act of 1927, the defendants ap-

peared before said Commission, and after hearing all the evidence the Commission made an order, decreeing that they were motor carriers within the meaning of said Act, from this order of the Commission the defendants appealed to the Circuit Court, in equity. That on April 26, 1928, the case was tried de novo by the judge without a jury, and the court after hearing argument made and entered a decree upholding the decision of the Alabama Public Service Commission and holding that the defendants were motor carriers under said Motor Carrier Act of 1927. From this order the defendants gave notice and perfected their appeal to the Supreme Court of Alabama, after said appeal was perfected, the defendants all dismissed their appeals, thus leaving the order and decree of the Circuit Court in full force and effect.

J. R. Smith,
Appellant
V.
State of Alabama,
Appellee

In the Supreme Court of Alabama
on appeal from the Circuit Court
of Jefferson County, Alabama.

This defendant was arrested and charged by affidavit and warrant with violating the "Alabama Motor Carrier Act of 1927." The case was tried on agreed statement of facts, and prosecuted by the solicitor of Jefferson County, the trial judge without a jury adjudged the defendant guilty as charged in the complaint and imposed a fine of \$50.00 and costs on defendant. From the judgment of conviction the defendant appealed to the Court of Appeals of Alabama, a brief was filed by me in behalf of the State, the case was reversed and rendered. An application for rehearing was duly made and overruled by the Court. A petition for certiorari to the Supreme Court was duly filed in behalf of the State and the case carefully briefed.

This case was decided by the Supreme Court in favor of the State of Alabama.

River Falls Power Company and
Alabama Utilities Company
V.
Alabama Public Service
Commission

In the Circuit Court of Montgomery
County, Alabama.
In Equity

This case is an appeal to the Circuit Court of Montgomery County, in equity, from an order of the Alabama Public Service Commission. There has been nothing done in this case as yet. The Commission having notified me that there will probably be settlement perfected among the parties to this litigation.

Yours truly,
J. Q. Smith,
Special Assistant Attorney General assigned
to Alabama Public Service Commission."

"Pursuant to your request I am submitting to you a brief summary and status of cases handled by me as Assistant Attorney General assigned to Alabama Public Service Commission since April 1, 1930, which are as follows:

State of Alabama, and Alabama
Public Service Commission,
Complainants.

V.

United States, A. C. L. R. Co.,
Seaboard Air Line R. R. Co. et al

In the Supreme Court of the
United States on appeal from the
District of the United States of
the Northern District of Alabama.

This case was made by the Alabama Public Service Commission by bill in equity in the United States District Court for the Northern District of Alabama on December 23, 1927, seeking to set aside orders of the Interstate Commerce Commission and to enjoin various railroads from seeking to file and make effective certain tariffs in accordance with certain orders of the Interstate Commerce Commission increasing the tariff on fertilizer and fertilizer materials hauled in intrastate traffic in Alabama.

This case was carried to the United States Supreme Court from a decree of the lower court. The Supreme Court remanded the same for a trial on the merits. On June 23, 1930, this case was heard by a three judge court at Jacksonville, Florida, and a decree was rendered dismissing the bill. This case was again appealed and is now pending in the Supreme Court of the United States.

Alabama Power Company, a
Corporation,
Complainant.

V.

Alabama Public Service
Commission
Respondents.

In the Circuit Court of Montgom-
ery County, Alabama.
In Equity

The complainant filed a bill in equity to supercede the orders of the respondent commission where a certificate of "convenience and necessity" was issued to the Tuskegee Light and Power Company to construct a power line from Tuskegee to Shorters, a distance of seventeen miles. The case was tried on the merits July 17, 1930. A decree was rendered sustaining the orders of the respondent Commission.

Lindsay Bus Company,
Complainant.

V.

Alabama Public Service
Commission,
Respondent.

In the Circuit Court of Pike Coun-
ty, Alabama.
In Equity

This is a case wherein the Complainant who operates a bus line from Troy to Dothan via. Elba, reduced the tariff (fare) without authority and

respondent commission ordered him to restore the original rate as fixed by said commission. The complainant appealed and the case was heard September, 1930, and the court has it under advisement.

Yours truly,
• J. W. Brassell,

Assistant Attorney General assigned to Alabama Public Service Commission."

—SOLICITORS—

WORK OUTSIDE OF CIRCUIT

By authority of Section 860, Code of Alabama, 1923, the Attorney General may direct any solicitor to aid or assist in any case in which the State is interested in any other circuit or county other than that of the solicitor so directed. On several occasions it has become necessary for the Attorney General to exercise this authority. In most instances I have had the full co-operation of the local prosecuting attorneys in obedience to such orders, and I desire to note commendation of the extraordinarily efficient and faithful work of Solicitors Bart B. Chamberlain, Clyde Vann, George O. Miller and George Grant in this respect. I respectfully invite attention to my comments pertaining to solicitors, as carried in the Biennial Report of 1926-28, and renew my recommendations therein contained.

—CRIMINAL INVESTIGATIONS—

The Attorney General is empowered to conduct investigations of violations of the criminal laws of the State. In executing the duties thus placed upon me, with the approval of the Governor, I have employed from time to time, persons who are citizens of Alabama, to conduct criminal investigations and to co-operate with local peace officers wherever possible. I have resorted to this method rather than go to the additional expense of employing outside detective agencies. Literally thousands of complaints reach this office annually pertaining to alleged violations of the criminal laws and with the co-operation of Your Excellency, this office has been able to satisfactorily conduct hundreds of such investigations, turning the data over to local peace officers wherever expedient. I do not deem it advisable to enter into an intricate analysis of each and every investigation conducted. I refer simply to some of the more important ones, such as the following:

THE COLBERT COUNTY INVESTIGATION of crime, and misconduct on the part of certain officials.

THE SHELBY COUNTY INVESTIGATION of crime, and misconduct on the part of certain officials.

THE INVESTIGATION OF THE BANKING DEPARTMENT of

Alabama in its relation to the failure of the City Bank and Trust Company, the Avondale Bank, the Woodlawn Bank and the Leeds Bank.

FAILURE OF THE BANK OF ENSLEY, investigation of.

FAILURE OF THE BANK OF SLOCOMB, investigation of.

FAILURE OF THE BANK AT SAMSON, investigation of.

FAILURE OF THE BANK AT GEORGIANA, investigation of.

MISUSE OF SCHOOL FUNDS BY HACKWORTH, investigation of.

THE BANK AT NORTHPORT, investigation of.

BANK OF VINCENT, investigation of matters in connection with.

BANK OF EPES, investigation of.

Numerous other bank failures were also investigated.

BANK OF NOTASULGA, attempted robbery of.

JEFFERSON COUNTY JURY COMMISSION, investigation of.

THE AVANT CASE.

Violations of Narcotic laws in Montgomery County and at Kilby Prison.

BANK OF THORSBY, investigation of.

Investigations for Alabama Real Estate Commission.

Investigation of alleged irregularities in the primary election of 1930 in Madison, Jackson and Chambers Counties.

BANK OF PINCKARD, investigation of.

FIRST NATIONAL BANK OF TALLASSEE, investigation of.

ELBA BANK AND TRUST COMPANY, investigation of.

Investigation of Houston County election matters.

AUTAUGA BANK AND TRUST COMPANY, investigation of.

In addition, this office has investigated numerous alleged crimes, particularly homicides, jail deliveries, arson matters, highway robbery, etc. We have worked in co-operation with United States officers in enforcing the Narcotic and Prohibition laws, and on many occasions, I have put investigators on duty with solicitors, sheriffs and other local officers to aid them in the enforcement of the laws. Hundreds of arrests and convictions have been had throughout the State as a result of this work. The most recent investigation of any particular importance has been in connection with United States officers with regard to certain conspiracies.

In addition to the foregoing, the Assistant Attorneys General of this office have been repeatedly on duty with grand juries and in the prosecution of criminal cases where solicitors were incapacitated or where solicitors had asked for additional help. Particular commendation for excellent work in this respect is due Assistant Attorneys General John J. Haynes, J. W. Brassell, R. T. Goodwyn, Jr., Luther Patrick and James L. Screws. The work of these assistants has been splendid in every way. They have met every test of duty under the most trying circumstances in the conduct of investigations and prosecution of crime.

CORPORATION—DELINQUENT TAXES, CHARTER FEES, PENALTIES, ETC.

This work has been performed by Hon. Willard McCall, Special Assistant Attorney General, and during the biennial period 1928-30 under his contract of employment, he has made the following collections which have been turned in to the Treasury:

		Total for the two years
Gasoline and Oil Tax for 1929	\$3,166.80	\$3,166.80
Telephone Privilege Tax 1929	186.90	186.90
Filing fee, permit fee and Charter fee for 1929	10,539.95	
Filing fee, permit fee and Charter fee for 1930	27,456.11	37,996.06
Franchise tax, interest and penalty for year 1929	5,832.46	
Franchise tax, interest and penalty for year 1930	21,713.87	27,546.33
Tonnage tax for the year 1929	3,497.23	
Tonnage tax for the year 1930	5,314.94	8,812.17
Carbonic Acid Gas tax for 1929	519.10	
Carbonic Acid Gas tax for 1930	84.55	603.65
Taxi Cab License for 1929	343.44	
GRAND TOTAL of all collections for years 1929-30		\$78,655.33

—SUMMARY—

CASES PENDING:

State v. Mobile Oil & Export Co., Mobile County.
 State v. Arrow Oil Company, Colbert County.
 State v. Interstate Oil Company, Montgomery County.
 State v. Home Oil Company et als. Sumter County.
 State v. Kershaw Mining Company, Jefferson County.
 State v. Rogers Talty Coal Company, Jefferson County.
 His work has been performed in a most efficient manner.

—OTHER CIVIL LITIGATION—

In the report of 1926-28 I incorporated a statement of civil litigation handled, but I am omitting this from the report of 1928-30 for the reason that it is carried in a civil docket on file in this office and this docket is open to inspection, and will be turned over to the next Attorney General.

Civil litigation has increased considerably, and there are now pending several important suits which the new Attorney General is familiar with.

Hon. A. A. Evans, First Assistant Attorney General, and formerly an Associate Justice of the Supreme Court of Alabama, has been chiefly

charged with this work, as well as the rendition of advice to the State Tax Commission and the coordination and immediate supervision of opinions generally. His long experience has been of great value and his loyal and efficient service is deserving of great praise.

RECOMMENDATIONS OF NEEDED

LEGISLATION

Based upon experience of the Attorney General and his Assistants, during my tenure of office of four years, I desire to recommend to Your Excellency for consideration the following matters which I think should be given attention by the next session of the Legislature, and the enactment of laws with regard to which will, in my judgment, result in more efficient administration of departmental affairs, equitable distribution of the tax burden and better enforcement of the law:

FIRST. I invite attention to the recommendations made by Hon. Harwell G. Davis, former Attorney General, in the second paragraph on page nine of the Biennial Report, 1924-26, and I renew those recommendations of my predecessor.

SECOND. I invite attention to the recommendations contained in the Biennial Report 1926-28, particularly beginning at page thirty-three, and I renew those recommendations.

THIRD. The Constitution of Alabama should be changed so as to effectuate a reapportionment of representatives in the legislature. The present apportionment of representation in the legislature is unfair to the white counties of Alabama.

FOURTH. The State Law Enforcement Department and the State Fire Marshal's Bureau should be combined, and as consolidated and reduced in number, the State police should be put in uniform with the exception of a few plain clothes men, and all of this business should be put as a part of the Attorney General's Department, under the direction of the Governor. This will reduce overhead expenditures and will tend toward efficiency by requiring the State police to work under the direct supervision of an officer trained in the law. It will not take any power away from the Governor, for he may still direct the Attorney General in the investigation and prosecution of crime. There is no need for the continued existence of three separate state law enforcement agencies. The Attorney General's Department should be the State Department of Justice in which should be concentrated all such police activities on the part of the State. As a part of its functions should be the State traffic police.

FIFTH. There should be a State Bureau of Criminal Identification as a part of the Attorney General's Department, to function in connection with similar local agencies and with the National Bureau of Identification. This would materially aid in the apprehension of criminals coming into

Alabama from other states, and in the general enforcement of the criminal laws.

SIXTH. The circuit and deputy solicitors should be taken out of the private practice of law and required to confine themselves to the prosecution of crime. If necessary, their compensation should be increased accordingly. This business of permitting local prosecuting officers to engage in the private practice of law is, in my opinion, bad for the efficient administration of justice. As well allow the circuit judge to engage in the private practice of law as to permit the circuit solicitor to do so. One is as reprehensible as the other.

SEVENTH. The laws of Alabama should be recodified. The present Code is full of contradictions and should be changed at once.

EIGHTH. The Revenue laws of Alabama should be codified separate and apart from the regular Code, but laws relating to education, child welfare, agriculture and other matters, except local and special statutes and appropriation bills, should be put into the regular Code of Alabama. I can see no reason for separate codes on these latter subjects. Concerning my recommendation as to the codification of revenue statutes, as the matter stands now, it is almost impossible to find what are the revenue laws of Alabama without a prolonged search. This should not be. A Code can be provided and in most instances when it is deemed necessary to change the revenue laws, the Code can be amended accordingly.

NINTH. I recommend the repeal of those code sections giving the Chief Justice the right to transfer solicitors from one circuit to another. The Chief Justice does not exercise this authority, but it is exercised by the Attorney General, and it should be exercised by the Attorney General since it is his business to advise or instruct circuit solicitors and it is properly his power to perform duties which devolve upon circuit solicitors in many instances.

TENTH. A penalty should be provided by statute for the failure of a solicitor to obey the orders of the Attorney General when ordered from one circuit to another. Such a penalty is provided for failure to obey the orders of the Chief Justice in similar matters, and, since the Chief Justice does not exercise the authority with which he is clothed, but, it is solely exercised by the Attorney General, this law should be amended accordingly so as to obtain the best results.

ELEVENTH. The Attorney General and his duly authorized deputies should be empowered to administer oaths in criminal investigations in the same manner as such authority is given to the State Fire Marshal and Banking Department and some other departments of State government.

TWELFTH. Definite provision should be made by law for placing important witnesses under bond for appearance where it is ascertained they are about to leave the state.

THIRTEENTH. Provision should be made for the confiscation and destruction of slot machines, other devices of chance, gambling paraphernalia, as well as burglar tools and weapons illegally carried. We have no such laws at the present time.

FOURTEENTH. Every person or concern selling pistols and revolvers should be required to keep accurate records identifying the weapons and the persons to whom sold. This is a protection to the law abiding citizen who possesses a pistol or revolver and will materially aid in the apprehension of law violators.

FIFTEENTH. It should be a violation of the law for one to impersonate a State, county or local peace officer, or any public official of the State.

SIXTEENTH. All matters relating to automobile licenses should be in the hands of a State Commissioner of Motor Vehicles.

SEVENTEENTH. The law should be amended so as to require the Attorney General to render an annual instead of a biennial report.

EIGHTEENTH. Adequate provision should be made for subpoenaing witnesses from other states. I referred to this in my former report.

NINETEENTH. The law should be clarified as to the exhumation of dead bodies where death is due to wrongful act of another.

TWENTIETH. The compilation known as "The Alabama Highway Code" should be repealed. This Act is extremely confusing. The state traffic laws can be greatly simplified by the repeal of this Act and substituting therefor a few well written statutes relating to the regulation of traffic.

TWENTY-FIRST. The anti-trust laws of Alabama should be strengthened. They are vague and indefinite and are practically worthless as they are now written.

TWENTY-SECOND. Adequate provision should be made for the regulation of chain stores as far as it is practicable to do so under the Constitution of the United States. It seems ridiculous to me that the laws of the State should be so weak that those who helped to build the commonwealth can receive no protection against the onslaughts of predatory wealth and special privilege.

TWENTY-THIRD. We should have a state inheritance tax law so as to take advantage of the federal law on this subject.

TWENTY-FOURTH. If the Constitution is amended so as to repeal the State ad valorem tax and substitute in lieu thereof a state income tax with exemptions found within the federal law, I think it will be a good thing. Land is taxed too highly. The ad valorem tax must be paid regardless of whether or not the land produces a profit. The income tax is paid only where a profit is realized. The substitution of a state income tax in place of the state ad valorem tax, allowing exemptions on incomes in the approximate amounts allowed by the federal government under the federal

income tax law, will greatly relieve the tax burdens on the land owner, and especially the land owner of moderate means, and will place the burden of taxation largely upon that class of persons who are able to bear it. In addition, the substitution would net the State an immediate annual increase of over Two Million Dollars.

TWENTY-FIFTH. There should be more adequate regulations of the use of public highways by trucks, buses and the like. As the matter stands now the State is practically subsidizing the freight and passenger bus agencies now using our highways for the reason that the people of the whole state are furnishing the rights of way and building the highways for this form of transportation, whereas the railroads, which, in the main are the largest tax payers, are furnishing their own rights of way, maintaining them at their own expense, and having to meet the unfair competition of this new form of transportation.

TWENTY-SIXTH. The Superintendent of Banks should be an appointee of the Governor without confirmation by any other agency and the Governor should have power to remove him at will. The powers, functions and duties of the State Banking Board should be clarified and proper responsibility should be placed on that board or the board should be abolished. The State Securities Law should be administered by the Banking Department. It has no proper connection with the Public Service Commission.

TWENTY-SEVENTH. The law should be changed so as to give the State the same number of strikes as the defendant in criminal cases.

TWENTY-EIGHTH. The statute giving rewards to peace officers for apprehending violators of the prohibition law should be repealed. There is absolutely no sense in having a standing reward for a liquor law violator when there is no such reward for a rape fiend, burglar or murderer.

TWENTY-NINTH. A modern and uniform system of book-keeping should be established for the State and for the counties. The present system for the State is antiquated.

THIRTIETH. The election laws of Alabama should be clarified. I recommend an investigation of the Kentucky election laws as worthy of consideration.

THIRTY-FIRST. More adequate provision should be made for the purging of registration lists of those not qualified as electors. Throughout the State today the situation is practically chaotic with regard to who is and who is not qualified to participate in an election. This should not be. The situation can be remedied by the legislature and should be done without delay.

THIRTY-SECOND. I recommend the repeal of the absent ballot law. This law opens the door for the perpetration of fraud and corruption.

THIRTY-THIRD. The law with regard to political qualifications of

voters and candidates should be clarified where primary elections are held at public expense.

THIRTY-FOURTH. All the ad valorem tax revenue on motor vehicles should be paid into the State Treasury to be used solely for the construction of highways and bridges.

THIRTY-FIFTH. The gasoline tax should be uniform throughout the State. Municipalities and counties should not be allowed to put on a gasoline tax in addition to the State tax.

THIRTY-SIXTH. The costs of court should be revised downward in entirety. With the multitude of fees now attached it is too costly for one to procure justice.

THIRTY-SEVENTH. The Workmen's Compensation law should be fashioned after the Ohio law. The present law is unfair to the workman.

THIRTY-EIGHTH. Every driver of a motor vehicle should be required to obtain a license to drive such vehicle, in addition to the license on the car.

THIRTY-NINTH. Every effort should be made to reduce the taxes on the necessities of life and require the well-to-do to bear their part of the burden, supplemented with taxes, first on those things that are not necessities.

FORTIETH. In preceding paragraphs I have referred to the weakness of our anti-trust laws, have commented on the inadequate provisions for the protection of the State's natural power resources, have made mention of the power trust, and I invite attention to the franchise tax on foreign corporations. I desire to state that the tax laws affecting foreign corporations must, in my judgment, be subjected to an honest revision. Statutes dealing with loan companies, insurance companies, etc., now contain exemptions which render such statutes practically worthless to accomplish a fair and just taxation of these concerns. The Constitution of Alabama plainly fixes the basis upon which franchise taxes are to be levied against foreign corporations. Similarly, the basis of franchise tax on domestic corporations is simply stated. A careful study of the statutes as written, and a comparison of them with the rules laid down by the Constitution, will show the fallacy of the present faulty legislation under which the State is attempting to operate. As the matter stands today, foreign corporations loaning money in Alabama, secured by mortgages on real estate located in Alabama, pay practically no franchise tax. With the faulty provisions of our insurance premium tax, domestic insurance companies pay practically no premium tax, but do pay a domestic franchise tax. The power trust operating in Alabama, which is merely a subsidiary of a foreign owned and organized corporation, does not pay what it should pay in the way of hydro-electric power tax because of the fact that, up to now, the power trust has been able to escape a great portion of the taxes through the method of wording the statute on the subject. Foreign corporations furnishing natural gas in Alabama have likewise avoided sufficient taxation. Our retaliatory tax law for insurance companies has been declared

unconstitutional in the Circuit Court of Montgomery County and the subject is now on appeal. This legislation deserves the careful attention of the law maker.

In Alabama, and in many other states of the Union, almost the entire water supply for municipalities, the lights, the electrical current for other purposes, the gas for heating purposes, is controlled by a few foreign corporations. Radio communication and broad-casting is now practically monopolized by a few interests, under the guise of promoting more wholesome and desirable entertainment for the public, and already efforts are on foot to form giant combinations of radio, telephone, telegraph and cable communication. The absolute control of these means of communication, can and will become a powerful weapon in the hands of a dominant political party or any agency of which it may become a dependent. Then too, there is the matter of chain banking. This State will soon be faced with the problem. There seems to be a steady unhindered growth of this business in several parts of the Union. With its spread across the continent, with the replacement of the independent bank by a unit of foreign origin, comes the destruction of community integrity. If the parent bank does not desire to permit growth of a particular community, it may forestall progress on the part of its citizenry by stopping of the flow of money. Again, the day has arrived when the man of modest means, to engage in business, must meet the competition of combined millions. The day is here when the voice of independence is dependent for expression upon the means controlled by a handful of men. The very necessities of life are now practically in the grasp and grip of privilege. With the establishment of a financial monarchy, with the destruction of home-owned enterprises and replacement with absentee landlordism and control, with a people dependent for the furnishing of necessities of life upon foreign hands, liberty is insecure and political freedom is an idle dream.

The strengthening of our anti-trust laws, the complete expose of the sinister political efforts of the power trust, the study of the frailties of our organic law, with a view to adequate revision, to my way of thinking is of far more importance than many other matters upon which law-makers pass their time, for it has almost come to pass that what you see, what you hear, what you say, what you eat and what business you engage in is in the control of wealth and privilege and he who would be independent in political thought and action or in the conduct of business, whether it be on the farm or in the shop, finds himself hemmed in by the ramparts of combine and sniped at by the minions of monopoly, so that he must either pay it homage or cast aside any hope of political preferment or freedom for independent success in business, lest he incur the ill will of the forces of greed and avarice.

In my judgment, the law-maker and other public officer who will set himself to the task of clarifying and simplifying our organic and statutory law to the end that the people of the commonwealth may be adequately protected against the evils referred to, is a true patriot.

In conclusion, I desire to express my deep gratitude to Your excellency for your whole-hearted cooperation with me and my assistants in our efforts to render efficient service in the enforcement of the laws and in the conduct of the many other affairs of this office during my administration, and I also wish to note that whatever success is properly attached to the performance of those duties required of me, has been due in large part to the faithful and efficient services of all the professional and clerical assistants who have served with me.

Respectfully submitted,

CHARLIE C. McCALL,
Attorney General.

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HON. BIBB GRAVES,
Governor of Alabama,
Capitol.

Sir:

Some days ago I transmitted to Your Excellency my communication containing a summary of the activities of the Attorney General's Department during the biennial period which closed with September 30, 1930, together with certain recommendations as to revision of the laws of the State. Inasmuch as there is now pending certain important litigation affecting the revenues of Alabama, and because of the fact that the following matters were not included in said letter of transmittal, and for the reason that this will be the last Report before the end of my administration as Attorney General, this second communication is prepared before the final publication of the Biennial Report for 1928-30.

The following are amongst the important civil suits instituted by the Attorney General for the State of Alabama, and now pending in the Circuit Court of Montgomery County:

STATE OF ALABAMA V. THE METROPOLITAN
LIFE INSURANCE COMPANY,
(a foreign corporation)

This suit was filed October 18, 1930, for the collection of \$46,425.92, in franchise taxes claimed to be due the State on the basis of the franchise tax return of this company for the year 1929. This concern, in its franchise tax return for that year, reported to the State Tax Commission, that it had over twenty million dollars loaned out in Alabama on real estate, which loans are secured by mortgages on same. It paid no franchise tax whatsoever on this vast amount. The franchise tax returns of this same corporation for the four previous years, shows that it has annually reported loans of over twenty million dollars for each year and has paid no franchise tax on any of the vast amount of capital thus employed in this State. From time to time, throughout the years, the Attorney General's Department has taken the position that efforts to exempt this capital from taxation are unconstitutional and void. However, such concerns as this have virtually escaped taxation of this kind by various and sundry means. The argument has been repeatedly advanced to State authorities that an enforcement of the plain mandate of the State Constitution as to the proper franchise tax on foreign corporations and a disregard of legislative loopholes providing for unconstitutional deductions, would constitute a breach of faith on the part of the State and would tend to drive foreign capital out of Alabama.

As I view it, it is a breach of faith with the people of this State for those whose duty it is to enforce a constitutional mandate to

disregard it and put superior to it an unconstitutional statute which relieves a foreign corporation from the payment of taxes properly due while requiring domestic institutions, such as banks, domestic insurance companies and other Alabama concerns in the money lending business, to be burdened with taxes. It is of great concern and importance to the people of Alabama, that this suit be prosecuted to a final conclusion and that every effort should be put forth to recover from this and similar foreign corporations now operating in Alabama the taxes they have escaped and are believed to be justly due. This suit will be pending at the end of my administration in January, 1931, and I am calling it to the special attention of my successor.

State of Alabama V. The New York Life Insurance Company.

This suit involves \$5,842.00, foreign corporation franchise taxes claimed to be due and unpaid, based on the 1929 tax return of this concern. No franchise tax has been paid by it for the four previous years within the statute of limitations, and if recovery is had here, then other unpaid taxes must be paid. This suit is similar to that first above mentioned.

State of Alabama V. Prudential Life Insurance Company.

This suit involves \$26,380.00 foreign corporation franchise taxes claimed to be due and unpaid by this concern, based on its tax return for the year 1929.

The remarks entered as to the two cases above mentioned also apply here.

State of Alabama V. St. Louis-San Francisco Railway Company.

This is a suit to recover penalties for the violation of the orders of the Public Service Commission in the amount of \$1,000.00. It was filed September 29, 1930.

State of Alabama V. Atlantic Coast Line Railroad Company.

This suit was filed October 28, 1930, for the recovery of \$424,463.71 for franchise taxes claimed to be due and unpaid. An attempt was made to provide by legislative act so that this concern might not have to pay those taxes, but the Constitution of the State governs over such unconstitutional act.

This suit will be pending at the end of my administration in January, 1931, and with so much of the State's revenue involved, it is my judgment that it is of great importance that it be brought to a successful conclusion for the State.

State of Alabama V. The Manufacturers' Finance Acceptance Corporation.

This suit, instituted November 19, 1930, involves \$2,018.42 foreign corporation franchise taxes claimed by the State to be due and payable.

State of Alabama V. The Manufacturers' Finance Company of Baltimore, Maryland.

This is a suit by the State for penalties due the State of Alabama by this foreign corporation on the claim that it is doing business in the State without first having qualified to do so, as required by law.

There is a penalty of \$1,000 for each transaction.

State of Alabama V. The General Water Works and Electric Corporation.

This suit, filed October 29, 1930, involves the sum of \$4,366.19, foreign corporation franchise taxes claimed to be due the State.

State of Alabama V. Alabama Power Company.

This suit, filed October 28, 1930, is for privilege taxes due the State in the amount of \$236,822.47, based on the tax schedule requiring the payment of two-fifths of a mill on each kilowatt hour of electric power manufactured and sold in Alabama.

In some fashion, this concern has thus far been able to escape payment of this tax, not to mention probably a great deal more that could be uncovered by an exhaustive audit of its books and an unbiased and accurate investigation of its activities in Alabama.

In my judgment, it is highly important that this suit be prosecuted to a final and successful conclusion.

State of Alabama V. The United States of America.

This suit is now pending in the Supreme Court of the United States. It involves the collection of hydro-electric power tax from the United States Government on electrical power manufactured and sold by it at Muscle Shoals. The State takes the position that the United States Government in manufacturing and selling hydro-electric power thereat is not engaged in a purely governmental activity.

This suit was instituted at the request of the Governor, and my successor is thoroughly familiar with it. However, it is of no more importance than the suit pending against the Alabama Power Company above mentioned.

State of Alabama V. The Southern Natural Gas Corporation.

This suit involves \$10,000 foreign corporation franchise taxes claimed to be due the State on the basis of the capital employed by this concern in Alabama, and it is highly important that this matter be prosecuted to a final and successful conclusion.

State of Alabama V. Guaranty Building and Loan Association.

This is a suit involving \$2,275.00, franchise taxes claimed by the State to be due as domestic franchise tax by this corporation. The legislature of 1927 attempted to relieve such corporations from payment of franchise taxes, but the Constitution governs and the statute is clearly void, and if other corporations are required to pay taxes, then the laws should be enforced here or else the Constitution should be changed. The successful termination of this suit is highly important.

State of Alabama V. The Hill Grocery Company, a corporation.

There are now pending appeals from final assessments by Tax Commission against this concern in the Circuit Court of Montgomery County in Equity. This corporation is believed to have escaped thousands of dollars of taxes. It was required to produce its books for only one year, but if it is required to produce its books for previous years within the statute of limitations, it is believed that it will be found that this concern is due taxes amounting to many thousands of dollars. It is of great importance that this corporation be made to pay what it is justly due the State and that a thorough and complete investigation be had of its records and accounts with a view to uncovering other possible delinquencies.

State of Alabama V. Anglo-Chilean Nitrate Sales Corporation.

This is an appeal from a final assessment by the Tax Commission of foreign corporation franchise taxes in the sum of \$1,425.69, claimed to be due the State on the basis of \$712,846.72 of capital employed in Alabama. It is now pending in the Circuit Court of Montgomery County, in equity.

State of Alabama V. National Cash Credit Association.

This is an appeal from a final assessment by the State Tax Commission against this foreign corporation on franchise taxes in the amount of \$1,786.86, claimed to be due and payable to the State on the basis of capital employed in Alabama. It is now pending in the Circuit Court of Montgomery County, in equity.

The litigation hereinabove mentioned involves approximately \$800,000 in taxes, which the State contends is due and unpaid. The successful prosecution of these cases would mean that the State would collect in delinquent taxes alone approximately two millions of dollars. This list does not include all the civil and criminal litigation pending in the Courts of the State at the time my administration ends. A complete list is being furnished by me to my successor, according to the files in the office, which have been accurately indexed.

However, the foregoing is of such great importance that I have thought it advisable to call special attention to same, and to make a permanent record of the status of this litigation.

In addition to the foregoing, I desire to call attention to a situation existing in Alabama laws which, in my judgment, demands immediate correction. This is with regard to the statutes by which corporations may completely monopolize the natural water power resources of Alabama.

1. I invite attention to Section 7193, Code of Alabama, 1923, which was originally Section 3627 of the Code of 1907. This Section reads as follows:

"7193. Power Companies; additional powers conferred.—All corporations organized under the general laws of this state, or heretofore under a special act of the legislature, and all corporations organized under the laws of any other of the United States, and which have complied with the constitution and laws of the State of Alabama as to foreign corporations, and which by their charter have the right to manufacture, supply and sell to the public, power produced by water as a motive force, shall, after acquiring by purchase or otherwise than by condemnation, a dam site or power site comprising not less than one acre of land upon each and opposite side of any water course, or after acquiring by purchase or otherwise than by condemnation a dam site comprising not less than one acre of land upon one side of any water course and (where the dam site on the other side of such water course is owned or controlled by the United States) shall have acquired the permission of the United States to attach to or use the lock, dam, or other property owned or controlled by the United States for an abutment site on the other side of such water course, in addition to other powers conferred by law, have the following rights, powers and authority.

To acquire by condemnation the lands and rights necessary for the construction and operation of said dam and works connected therewith or useful thereto, either up or down stream therefrom, and (in case of non-navigable streams) to construct and operate at said site, or other point up or down the stream therefrom, and across said stream, a dam, together with all works incident, necessary, or related thereto, and in connection therewith to impound or divert water of any water course or water courses of this State, and to raise higher such dam and to enlarge the works necessary, related, or incident thereto, and to construct other works

necessary, incident, or related thereto, either up stream or down stream therefrom, as may be required or deemed expedient by such corporation, in the manufacture and supply of power produced by water as a motive force.

To acquire by condemnation all lands or waters or interests or rights or easements in lands or waters likely to be flooded or damaged by impounding or diverting the waters of any water course in this state or its tributaries, or necessary for the construction or operation of dams or power houses, or works necessary, incident or related thereto, or likely or liable to be flooded or damaged by the construction or operation or enlargement of the dams or works incident, necessary, or related thereto, or damaged or taken in the construction, operation, or use of canals, tail-races, or exit ways necessary, useful, or convenient for the escape, conveyance or return of the water used in the operation of the works or power plant.

To acquire by condemnation the necessary lands for sub-stations and transmission lines, but shall have no right to condemn a private residence, nor the outhouse, garden, nor orchard within the curtilage of a private residence, for a sub-station, site, or for rights-of-way for its transmission line or lines.

Such corporation shall have no right to condemn lands, water, or water rights in use for power purposes by another corporation upon the same water course, having similar powers and essential to its operations; or lands, water or water rights held by such other corporation for power purposes where the lands, water, or water rights in themselves and taken alone or in connection with other lands, water, or rights owned by such other corporation, can be made the reasonable basis of a water power development of at least one thousand continuous horsepower; but may condemn lands, hydraulic structures, water, or water rights held by such other corporation at any point upon the same water course, unless the lands, structures, or rights in themselves and taken alone or in connection with other lands or rights owned by such other corporation can be made the reasonable basis of a water power development of at least five hundred continuous horsepower, and may condemn lands, hydraulic structures, water, or water rights of such other corporation, at any point upon the same water course, in excess of such other corporation's actual facilities for using the same (independently of the actual or proposed works of the condemning party) for the manufacture of power by its plant as the same is already established at the time the condemnation proceeding is begun, provided the plant of such other corporation has been in operation for five years or more preceding the commencement of the condemnation proceedings. Nor shall such corporation have the right to condemn the lands, hydraulic structures, water, or water rights of any cotton factory, at any point upon the same water course, in actual and prior use by it for the

operation of its plant; but may condemn the lands, hydraulic structures, water, or water rights of such cotton factory in excess of what is actually in use, or may be used at normal stages of the stream, for the operation of its plant as already established at the time the condemnation proceeding is commenced. Such corporation may by condemnation acquire the right to flood grist mills and industries in conjunction therewith, together with lands and water rights appertaining thereto. In all cases just compensation shall first be paid to the owner in the manner provided by law for all property taken."

With a minor amendment appearing in the first paragraph, this statute is the same as it was in 1907.

Again, I invite attention to Section 7202, Code of 1923, which was originally Section 3636, Code of Alabama, 1907, and which reads as follows:

"7202. Duty to serve the public.—Any corporation which exercises any of the rights conferred by this article, shall after the completion of its works and plants, be under the duty and obligation to the public to manufacture and sell to the public, electric current, produced at its plants, and any corporation manufacturing, selling, and supplying power, heat, light, or electricity, produced by water as a motive force under the provisions of this article, must sell such power, heat, light, or electricity to any person or persons, municipal or other corporations, in order in which requests or demands are made for such light, heat, power or electricity. Nothing herein, however, shall be construed to require any such corporation to furnish light, heat, power, or electricity to any person or persons, corporation, or corporations, until satisfied of his or its financial responsibility, and except in conformity with its reasonable rules and regulations and reasonable prices for the same, and except as far as the capacity of its plant will permit."

No change has been made in this statute.

In connection with the above statutes, I invite attention to Section 10570, 10571 and 10572, of the Code of Alabama, 1923, which originally were Sections 6148, 6149 and 6150 of the Code of 1907, and which read as follows:

"10570. Easement and right to construct dams across navigable rivers.—Any person, firm or corporation organized for the purpose of improving the navigation upon a navigable river in the State of Alabama, and of developing in connection therewith a water power thereof by a dam and lock, or a system of locks and dams, and electrically transmitting and distributing such power for the use of the public, which shall have acquired the necessary lands upon both sides of said river to the extent of at least one more than half of the necessary abutment sites for the said dam or system of dams, and locks or system of locks and shall have been

organized or incorporated for the specific and particular purpose of improving the navigation of and developing water power in connection with a particular and specified river, and has prepared plans for the construction of a dam or system of dams and a lock or system of locks appertaining thereto, and filed a copy of said plans in the office of the Secretary of State of Alabama, together with a certified copy of its articles of incorporation (if a corporation), which provides both for the improvement of navigation of such river, and for the developing of the full water power of the same over the stretch of river thus to be improved, shall have authority to construct a dam or system of dams, with a lock or system of locks appertaining thereto in such river for the improvement of navigation of said river by one or more slack water pools, due to the construction of said dam or dams and the development of water power in connection therewith, and to that end and in consideration of the benefits to the public by reason of the improvement of navigation of such river and the development of water powers thereof, as herein provided, is granted an easement for power purposes to and in the waters and bed of the river in which dam or system of dams, and lock or system of locks are to be constructed, for the full area covered by the slack water pool or pools which will be created by the construction of the said dam or system of dams, to the extent necessary for developing the full power of said river over that length of same upon which navigation is to be improved as provided herein, and for providing suitable and convenient sites for the said dam or system of dams, locks, power houses, and other features appurtenant thereto and necessary for navigation and power purposes, or for either of them, and to the extent made necessary by the impounding, diversion, and conversion of the said waters as the same may be caused by the construction of the said dam or system of dams, or by any other change from the normal state of the said river, due to said construction, and necessary for the purpose of deriving the energy therefrom."

"10571. Eminent domain, improvement of navigation.—Any such person, firm or corporation may exercise the power of eminent domain, for the purpose of acquiring such lands as it may be necessary or convenient to flood or otherwise utilize in order to improve navigation as provided in this article, such lands to include as well as all the area submerged, a strip of land fifty feet in width bordering upon the margins of the slack water pool or pools as the same may be defined at the highest stage of the river at any time after the completion of the improvements herein provided for, and the right hereby conferred to exercise such power of eminent domain is cumulative. No person, firm, or corporation shall acquire the rights by this article granted, unless the dam or system of dams, and lock or system of locks, to be constructed by such person, firm, or corporation are so planned as, when constructed, will by the operation thereof improve the navigation of the river in which the dam or system of dams, lock or system of locks, are to be built,

and will develop the full power of such river over the length of same upon which navigation is to be improved, as provided in this article. Such person, firm, or corporation shall commence work upon said dam or system of dams, locks or system of locks, within five years from the date of securing the consent of the Federal Government to do so, and shall complete the same within the time prescribed by the United States Government. No foreign corporation shall acquire the rights granted under this article until it has complied with the laws of Alabama with reference to foreign corporations."

10572. Prior Rights.—The person, firm or corporation which first in point of time, shall have complied with the provisions of this article shall be entitled to all the rights and privileges herein granted; and the operation of this section shall be retroactive."

These Code Sections should be repealed. And in making this statement particularly with regard to the first two sections above mentioned, I need only to quote the words of Hon. Emmet O'Neal, formerly Governor of Alabama, in his final message to the Legislature of the State in commenting on the monopolization of the water power resources of Alabama. He stated:

"The energy which can be developed from falling water in our rivers and streams constitutes one of the most valuable assets of the State. It has been estimated that the water powers of Alabama, if developed, would amount to one million and eighty-four thousand horse-power. It is now generally conceded that the day is not far distant when the development of hydro-electric power will supersede steam, on account of its greater cheapness and the facility with which it can be transmitted almost any distance. This enormous water power was at one time an asset which belonged to the people of the State. Under the law, the State had an easement or title to the waters and bed of every navigable stream in its borders. By the Act passed in 1903 and amended in 1907, and found in Section 3627 of the Code, the State gave to any corporation, domestic or foreign, organized to manufacture and sell to the public power produced by water as a motive force, and that acquired a dam site or power site comprising not less than one acre of land upon each and opposite sides of any water course, the power to acquire by condemnation the necessary lands and sites for the construction of its dams and the works connected therewith. In other words, this statute vested in these corporations the State's sovereign power of eminent domain—the right to take private property for public uses. If an individual acquired riparian rights on each bank of the stream, he could not by this statute exercise the power of eminent domain, for that power is alone conferred upon corporations. Under the statute, therefore, and in accordance with the decisions of our Supreme Court, with its acre on each side of a stream, water power corporations can go up stream or down

stream any distance it sees fit and destroy for its own use or take by condemnation, practically every water power held on the stream. Nor does the law require that the corporation exercising this extraordinary power should build a dam. The only requirement is the ownership of two acres upon each side of a stream. Under the extraordinary power conferred upon such a water power corporation, it could sweep the river clean of minor enterprises and industries—overflowing public roads, wiping out ferries, flooding grist-mills, taking everything which obstructed its march, except a dwelling house. Through the provisions of our law, the State makes an absolute gift and surrender of all its valuable water power assets, its right, title and easement to the waters and beds of stream to the corporation organized in compliance with its terms, without exacting one cent of toll of revenue. It is difficult to understand why these valuable rights, franchises and privileges should be conferred alone upon corporations and denied to individuals, firms or partnerships. By Section 3636 of the Code, it is made the duty of any corporation selling to the public electric current produced at its plant, as well as power, light or electric power produced by water as a motive power, to sell the same in the order in which requests or demands are made for such light, heat, power or electricity. If the statute had stopped here, it could be considered a proper protection to the public, but I call your attention to the further provision, which says that 'nothing shall be so construed as to require such corporation to furnish light, heat, power or electricity to any person or persons, corporation or corporations until satisfied of his or its financial responsibility and except in conformity with its reasonable rules and regulations and reasonable prices for same and except as far as the capacity of its plant will permit.' The effect of this provision is to vest the absolute and arbitrary power in the water power company to sell its power to such persons or corporations as it may elect. It has the unqualified discretion to select its own consumers, and from the exercise of this discretion there is no appeal. It is thus given power not to serve the public equally, but to deny the use of power to any person or corporation that may incur its hostility or whose destruction as an industry it may desire. Under the original Act as passed by the Legislature, it was provided that if the water power company refused to sell its power to a person or corporation they could tender bond and secure this power. This provision was struck out when our laws were codified and should be restored. Not only has the State made a gift to these companies of all of its interests in its water powers but has also exempted them from State, County or municipal taxation, either under general or local laws, for ten years after the beginning of the construction of their plants.

VALUE OF HYDRO-ELECTRIC POWER.

"It was only in recent years that the value of hydro-electric power was discovered. Fifteen years ago, hydro-electric power

could be transmitted only about ten miles and today the distance to which it can be carried is hundreds of miles. It can furnish power at less cost than can be furnished by any other way. Steam cannot compete with it. We must recognize that the day is not far distant when the creation of power by falling water instead of by steam, will be necessary to the orderly management and development of the industrial enterprises of the country. In the near future, when this power supercedes steam, no manufacturing plant can compete with it, on account of the low cost at which it can be produced and its many advantages over steam power and the distance to which it can be transmitted.

"How is the consumer to be protected? It is well to remember that the corporations that develop the energy from falling water in our streams are allied in interests and do not compete in prices. Immense sums of money are necessary to develop the power and the individual or corporation that invests in these enterprises should receive not only fair but liberal returns. Unfortunately, prices charged are generally not based upon fair returns for the money invested, but are frequently so arranged as to be slightly less than the cost of furnishing the same power from steam. Therefore, when water power is developed, having to do with commodities of every day life—heat, light and power, every individual or manufacturing enterprise within the territory is affected, and therefore, due care should be taken to protect the public interests. Recognizing that the water power companies are natural monopolies, the rates which they charge should be regulated by a proper public utility commission.

"Under the general dam bill prepared by Secretary of War Garrison and which received the approval of the present administration, it is expressly required that "the State in which the company is incorporated or in which it operates must for the protection of the people and the prevention of monopoly and other misuse have provided a commission or body authorized and empowered to properly regulate public utilities of this character, and such body or such law must have provided proper regulation to the end that the company shall make proper use of the utility, give proper service, make only reasonable charges and otherwise conduct itself in a way to conserve the rights of the people in the use of the public utility. In all cases where these provisions have been complied with, the Secretary of War may issue a permit, franchise or right for any period up to fifty years.

"Similar requirements are found in the bills which are now pending before the Congress.

"In other words, the State of Aablama would be required to protect the consuming public by proper regulations requiring proper supervision and reasonable charges and service, or the government will undertake that duty.

"Before the passage of the laws adopted in 1907, no dam could be erected across any navigable stream in Alabama without the consent of the State government. There should be no disposition on our part to prevent the utilization of the enormous water power now being wasted in our navigable streams, or to hamper or fetter any company seeking to develop this power by unjust or unreasonable restrictions. It is folly, however, to say that this power will not be developed unless investors are granted exemption from taxation and all easements which the State might possess in this valuable asset.

"I would therefore recommend that the present laws granting to corporations developing water power the right and easement of the State in and to the beds of the streams as well as exemptions from taxation be repealed. I would recommend that in lieu thereof the State grant its right, title and interest in and to the beds and waters of its navigable streams only to those who will pay the State a reasonable toll on each horse-power developed and sold. I further recommend that a public utility commission be created with power to regulate the rates of water power companies developing hydro-electric power and that immediate steps be taken to conserve this important asset and source of revenue, which should be the heritage of all the people of Alabama. It is necessary that these corporations should exercise the power of eminent domain. This power should not be exercised before their dams are constructed and the present laws on the subject should be carefully revised so as to prevent injustice and to secure just compensation to all who may be injured or damaged by the construction of water power plants.

"I would recommend that very liberal powers be conferred upon the public utility commission, in reference to regulating the charges of water power companies and that we take immediate steps to create a conservation commission, with power to acquire for the State riparian rights upon navigable streams in Alabama which the State can now acquire and to conserve those which the State may now own and which have not been surrendered for a valuable consideration."

While some feeble efforts at regulation have since been made, the words spoken fifteen years ago by that illustrious statesman as quoted above, were never more true than they are today and the statutes to which he referred, instead of being repealed, still remain in the Code of Alabama. Alabama should act and act quickly in this matter, at least to save from complete monopolization that part of her vast power resources that may not have been swallowed up.

And in this connection, for the proper and adequate protection of the people of the State in the adequate enjoyment of these vast resources, I most urgently recommend the enactment of a statute similar to that of the State of Maine, which is as follows:

"No corporation, unless expressly authorized so to do by special

act of the legislature, shall transmit or convey beyond the confines of the State for the purpose of furnishing power, heat or light, any electric current generated directly or indirectly by any water power in this State; nor sell or furnish directly or indirectly, to any person, firm, or corporation, any electric current so generated to be transmitted or conveyed beyond the confines of the State for any of such purposes. Nothing in this section, however, shall prevent any railroad corporation doing business in this State from transmitting electric current, however generated, beyond the confines of the State for the purpose of operating its road between some point in this State and any point or points beyond its confines; nor shall this section apply to any corporation engaged on the third day of July, one thousand nine hundred and nine, in conveying or transmitting electric current beyond the confines of the State, or chartered or empowered so to do, nor affect or impair any contracts then existing for the transmission of electrical current beyond the confines of this State."

The question of the complete monopolization of the water power resources of Alabama by one concern is, to my way of thinking, a matter of supreme moment. Monopoly is in the hey-day and fullbloom of power. With the complete monopolization of the retail and wholesale of the necessities of life by foreign moneybarons; with the time upon us when the life of the independent bank is threatened by the concentration of wealth in the hands of absentee landlords; with the day here when you cannot turn on your lights, your gas or your water except that it is controlled by outsiders; when what you read in much of the daily press, what you see on the screen, what you hear over the radio, is practically in the control, grasp and grip of special privilege, it seems to me that it is high time the law making body of this commonwealth should give the subject immediate attention and if the organic law of Nation or State is so weak as to permit monopoly to travel unmolested, then every effort should be made to bring about a change.

I also invite attention to the fact that under Section 56 of an Act approved July 22, 1927, the franchise tax on corporations is decreased fifty per cent effective December 31, 1931. This has the effect of reducing State revenue many hundreds of thousands of dollars, and I can see no good reason for the reduction at this time. I therefore recommend repeal of said Section of said Act.

In conclusion I can see the great advisability of prompt provision for a thorough and exhaustive Legislative or Executive investigation into the activities of the power trust in Alabama, and that the anti-trust laws of other states, statutes as to monopolies and combines be carefully studied with a view to freeing Alabama of the inevitable evils attendant on the steady unhindered growth of absentee landlordism, and so that the vast natural power resources of the State shall not become wholly and permanently vested in foreign hands that might seek to control the political affairs of the people.

Yours truly,

CHARLIE C. McCALL,
Attorney General of Alabama.

OPINIONS

October 1, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
Montgomery, Alabama.

Dear Sir:

Where funds have been drawn from one fund in the State Treasury for the use of another fund in payment of an obligation due by such other fund, the fund drawn from should be reimbursed by the fund making such use as soon as there is sufficient money in the latter fund.

Opinion by Assistant Attorney General Evans.

You ask my opinion upon the following statement of facts:

At a former date the Game and Fish Protection Fund being depleted, there was drawn from the Fish Hatchery Fund for the use of the Game and Fish Protection Fund the sum of \$4,532.89. The Game and Fish Protection Fund now has on hand money sufficient to reimburse said hatchery fund. You wish to know if it is legal to make such reimbursement.

In reply I will say that, in my opinion, it is legal so to do. In an opinion given out by me on September 28, 1928, at the request of Hon. Woolsey Finnell, State Highway Director, it was held that where funds in the Treasury of the State, not primarily liable or intended for a certain expenditure by the State are used for such expenditure, it becomes a duty to reimburse a fund so used, out of the funds primarily liable as soon as the condition of the fund primarily liable and intended by law to be so used, will permit such a course of procedure.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 1, 1928.

Hon. R. E. Tidwell,
State Superintendent of Education,
Montgomery, Alabama:

Dear Sir:

Local Act of the Legislature 1927, providing for election of County Superintendent of Education for Cherokee County is constitutional.

Opinion by Assistant Attorney General Koonce.

I have your letter of May 22, 1928, with copy of a local Act providing for the election of a Superintendent of Education for Cherokee County. enclosed. This Act was approved August 2nd, 1927.

You request my opinion:

Is the above Act constitutional?

In my opinion the above act is Constitutional. I have examined the Senate Journal, and I find that notice and proof was made of the intention to apply for the passage of said Act, as is required by law. I have examined the Act, and I do not find that it violates any provision of the Constitution.

I, therefore, advise you that the above Act should be given full force and effect.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 1, 1928.

Hon. John C. Turner,
Commissioner of Maintenance,
Highway Department,
CAPITOL.

Dear Sir:

Construction of Section 106 of Highway Code, Acts 1927, page 390 et seq.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of June 12th, 1928, is acknowledged. You wish to know if, when a person is convicted of a misdemeanor provided under Article III of the Highway Code and sentenced to hard labor for the County for the payment of the fine, where he fails otherwise to pay the fine, your department is entitled to the amount represented by said labor.

In reply will say that in such cases, all money collected by the trial Court, or any officer authorized to receive same, on account of such hard labor imposed for fines, must be forwarded to the State Treasurer and by him credited to the State Highway Department to be used for the maintenance of roads and bridges. The aggregate amount of money received, in such cases, where the fines are worked out as provided by law, is much less than the amount of the fine named. Section 5290 of the Code provides how much labor is required for each fine; but the County never receives, for the hire of the convict, during the period of time for which he is sentenced to hard labor for payment of the fine, the amount named as fine. The amount actually received as hire for the convict for the period sentenced to pay the fine, is what should be remitted to the State Treasurer, in such cases, for use of the Maintenance Department of the State Highway Department.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 2, 1928.

State Auditor,
CAPITOL.

Dear Sir:

H. B. 36, approved July 8, 1927, increasing salary of solicitor at Bessemer, and providing for assistant held constitutional.

Opinion by Assistant Attorney General Koonce.

I have your letter of July 23, 1928, with letter of Ben G. Perry, Deputy Solicitor, enclosed. Mr. Perry states in his letter that he appointed one Arthur Green as assistant solicitor under the authority of H. B. 36, approved July 8, 1927, (General Acts 1927, page 103) and he requests that remittance be made to Mr. Green for his salary of \$100.00 per month from July 8, 1927 up to July 1, 1928, and that remittances of \$100.00 each be made to him each month thereafter.

You request my opinion:

If you, as State Auditor, are authorized to issue a warrant for the above salary?

In my opinion H. B. 36, referred to above is constitutional and you are authorized by its provisions to issue a warrant as requested.

I rendered an opinion on November 9, 1927, to Hon. M. V. Henry, Treasurer of Jefferson County, in which I held H. B. 36, referred to above to be unconstitutional. In rendering said opinion I relied solely on the case of **Birmingham Electric Company v. Harry**, 111 So. 41, and held H. B. 36 to be unconstitutional because it was a local law and no notice was given of the intention to apply for its passage. I rendered an opinion on November 25, 1927, to Hon. M. V. Henry, Treasurer of Jefferson County, in which I held that said H. B. 36 was unconstitutional and void in its entirety.

The Supreme Court, subsequent to the rendering of the above opinions, rendered the opinion in the case of **Henry, County Treasurer, v. State ex rel Hartsfield**, 117 So. 626. Reference was made in said opinion to the case of **Birmingham Electric Company v. Harry**, supra, and the court held that the fact that notice was not published of the intention to apply for the passage of a law increasing the salary of the sheriff of Jefferson County did not render said law unconstitutional. It is true that the bill referred to in the case of **Henry, County Treasurer v. State ex rel Hartsfield** was passed on a population classification, and that H. B. 36 which we are here considering was not passed on such classification (General Acts 1927, page 103). However, in my opinion what was said by the court in the case of **Henry, County Treasurer v. State ex rel Hartsfield**, supra, applies to said H. B. 36, therefore, I hereby overrule the opinions rendered by me on November 9, 1928, and November 25, 1928. Said opinions are void and of no force and effect.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 2, 1928.

The Judge of Probate,
Butler County,
Greenville, Alabama.

Dear Sir:

Chief Probate Clerk not county officer—County not liable for premiums on bond of.

Opinion by Assistant Attorney General Rayburn.

I have your letter of July 12, 1928.

You request my opinion:

Are the annual premiums on the bond of a chief clerk in the Probate Office proper charges against the county?

I advise you that such a charge named by you could not legally be made against the county. A chief clerk in a Probate Office is not a county officer, and for this reason the county can not legally pay the premium on the bond of said clerk. The bond of said clerk is made payable to the Probate Judge, and said clerk is answerable to the Probate Judge for malfeasance and non-feasance—and not to the State or county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 3, 1928.

Mrs. Mae Amiss Ashmore,
Circuit Clerk, Walker County,
Jasper, Alabama.

Dear Madam:

Fine and Forfeiture Fund. Issuance of execution.

Opinion by Assistant Attorney General Haynes.

I have your letter of July 19, 1928, in which you request my opinion on the following matters:

1. Is the clerk entitled to a fee from the fine and forfeiture fund for the county for issuing execution for maintenance of prisoners in jail when execution is returned "no property found?"
2. Is it the duty of the clerk to issue execution in cases of this character?

In answer to your first question see the law regulating the fine and forfeiture fund of the various counties of the State set out in an Act of the Legislature approved February 18, 1927 (General Acts, 1927, page 45). No provision is made by this Act for payment out of the fine and forfeiture fund

of the cost of issuing execution for maintenance of prisoners while in jail, and upon the return of the execution "no property found". Costs and fees are penal in their nature and before a charge can be made for either, there must be some expressed statute authorizing it. Section 3734 of the Code of Alabama, 1923, is as follows:

"No fee charged unless expressly authorized.—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

109 Ala. 162 (19 So. 503)

In answer to your second question if there is a judgment against the defendant for board bill while in jail it naturally follows if it is not paid, execution should issue and the clerk is the only one charged with this duty.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The Superintendent,
State Bureau of Insurance,
Montgomery, Alabama.

Dear Sir:

Mutual Aid, Benefit and Industrial Companies.

Opinion by Assistant Attorney General Haynes.

I have your letter of June 14th, 1928, in which you state that the Norwood Hospital of Birmingham, Alabama, a corporation, has contracts with a number of industrial corporations in Jefferson County, to provide dental, medical and surgical attention for the employees of such industrial corporations, and that it is your information that this hospital also has individual members not covered by industrial contracts and have agents throughout the Birmingham district soliciting business for this hospital.

Upon the facts above stated you request my opinion:

1. Does the Act approved Sept. 9, 1927 (General Acts, 1927, p. 634) exempt the Norwood Hospital from the operation of the mutual aid law, and if so to what extent?
2. If the corporation employs agents or solicitors, are such agents or solicitors subject to an agent's license in the event that the hospital itself is exempt from the operation of the law?

In answer to your first inquiry, I am of the opinion that said Norwood Hospital is exempt from the operation of the mutual aid, benefit and industrial association law, so long as its operations are confined to the employees of the contracting corporation. Your attention is invited to the following

proviso of said Act, approved September 9th, 1927, which, in my judgment, exempts this hospital from the operation of the law governing mutual aid and benefit associations:

*** Provided, however, that nothing herein contained shall prevent agreements by and between industrial corporations and hospitals to provide for dental, medical and surgical attention for the employees of such industrial corporations; and provided further that nothing herein contained shall prevent the employment of medical doctors and surgeons for the purpose of giving medical and surgical attention to the employees of such corporation."

In answer to your second inquiry, if, said corporation employs agents or solicitors who solicit business from individuals, making contracts for services with those not employees of any contracting corporations, it would come under the law governing concerns of this character, and would be subject to all licenses now required by the Revenue Laws of this State for such associations, and the agents soliciting contracts carrying such benefits would also be subject to license for carrying on such business.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The Probate Judge,
Greenville, Butler County, Alabama.

Dear Sir:

License for sale of Welch's Grape Juice by wholesale grocery company.

Opinion by Assistant Attorney General Rayburn.

I have your letter of July 28, 1928.

You request my opinion:

Is a wholesale grocery company which sells Welch's Grape Juice subject to the payment of a license therefor? If said company so engaged is subject to a license, please advise the amount thereof.

I advise you that a wholesale grocery company which sells Welch's, or any other grape juice, is subject to a license therefor.

Schedule 96½ of an Act approved September 15, 1919, (General Acts 1919, p. 430) provides as follows:

"WHOLESALE SOFT DRINKS.—Each person other than bottlers operating plants in this State who are otherwise licensed, engaged in the

business of selling at wholesale non-alcoholic, carbonated or other soft drinks, shall pay an annual license of **fifty dollars.**"

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

Hon. Bibb Graves,
Governor of Alabama,
CAPITOL.

Dear Sir:

Condemnation of land for State Normal School at Troy.
Authority of Municipal Corporation to pass zoning ordinances.
Opinion by Assistant Attorney General Koonce.

I have your letter of August 15, 1928, with letter of Dr. Shackelford, President of the State Normal School at Troy, enclosed. Dr. Shackelford states in his letter that it appears that the Normal School at Troy will not be able to secure some of the land desired by the building committee at a reasonable price without resorting to the process of condemnation. He also states that he believes that the interest of the school will be subserved by the creation of a zone around it in which the character and use of the buildings may be specified.

You request my opinion:

1. Can property be acquired by condemnation for the State Normal School at Troy?
2. Can the City of Troy pass an ordinance creating a zone around the State Normal School which ordinance will prescribe the character and use of the buildings in such zone?

In my opinion property can be acquired by condemnation for the State Normal School at Troy.

Section 7476, Code of 1923, provides for condemnation of property for public use. The Supreme Court of Alabama, in the case of Dean vs. County Board of Education, 97 So. 741, held that a county board of education can acquire, by condemnation, land for school purposes. Certainly, if property can be acquired, by condemnation, for the use of the schools of a county, it can also be acquired, by condemnation, for the Normal School of the State.

In my opinion the City of Troy can pass an ordinance creating a zone around the State Normal School which ordinance shall prescribe the character and use of the buildings in such zone. Section 1878, Code of 1923, contains authority for such zone.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The Clerk of the Circuit Court,
Washington County,
Chatom, Alabama.

Dear Sir:

Fines and forfeitures for violations of Alabama Highway Code.

Opinion by Assistant Attorney General Rayburn.

I have your letter of September 26, 1928, in which you state that the Court in your Circuit has been proceeding under Sections 3324 and 3328, Code of Alabama, 1923, in the matter of convictions for driving automobiles while intoxicated, and reckless driving.

You request my opinion:

What disposition should be made of the fines and forfeitures arising from convictions for the offense of driving an automobile while intoxicated and reckless driving, in view of an Act approved August 23, 1927, (General Acts 1927, p. 406)?

It is my opinion that Sections 3324 and 3328, Code of Alabama, 1923, were repealed by an Act designated as the Alabama Highway Code, which was approved August 23, 1927.

Section 230 of the Act approved August 23, 1927 (General Acts 1927, p. 408) provides that said Act shall, "except as may otherwise be provided for certain articles contained herein, go into effect on its passage and approval by the Governor."

Section 48 of said Act declares the driving of a vehicle while the driver is intoxicated to be a misdemeanor, and Section 49 of said Act makes the reckless driving of a vehicle upon a highway a misdemeanor; both Sections fix the punishment for said offenses. No exception is made as to the time that said Sections take effect, therefore, they went into full force and effect on August 23, 1927.

Up until August 23, 1927, you should dispose of the fines and forfeitures, for the particular violations named by you, in conformity with Sections 3324 and 3328, Code of Alabama, 1923. On, and after, August 23, 1927, you should dispose of the fines and forfeitures so collected in conformity with the Act approved on said date, and known and designated as the Alabama Highway Code, found at pp. 348 to 408, inclusive, General Acts of Alabama, 1927.

Where a prosecution was instituted under Sections 3324 and 3328, Code of Alabama, 1923, and a conviction is had at any time subsequent to August 23, 1927, the provisions of Section 106 of the Act approved August 23, 1927, (General Acts 1927, p. 390) do not apply thereto. That is to say, said Act is not retroactive.

All fines and forfeitures which have been collected by you as Clerk of the Circuit Court, or ex-officio clerk of the County Court, for the violations

named by you, should be, within thirty days after the collection of the same, forwarded to the State Treasurer, as provided by Section 106 of an Act approved August 23, 1927 (General Acts 1927, p. 390).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Chairman County Democratic Executive Committee not entitled to compensation for handling absentee ballots.

Opinion by Assistant Attorney General Brassell.

This letter acknowledges receipt of a letter from W. L. Darby, Assistant Examiner of Accounts requesting that I advise him as to the liability of Russell County to the Chairman of the County Democratic Executive Committee for delivering Absentee Ballots.

You request my opinion:

Is Russell County liable for the Chairman of the County Democratic Executive Committee in any amount for the handling of absentee ballots in primary elections?

In answer to your question, I am of the opinion that the county is not liable for the payment of any sum to the chairman of the county Democratic executive committee for the handling of absentee ballots.

Opinions of Attorney General, Book Six, p. 189 (Office Edition).

The chairman of the county democratic executive committee is not an officer. He simply takes the duties of chairman cum onere. No provision of law is found for such a payment. It is a well recognized principle of law established by long lines of adjudicated cases, that no fee shall be allowed unless an express provision of law provides therefor. Such matters are not left to intendment promises or conjecture.

Mobile County v. Williams, 188 Ala. 639 N. Ala. R. R. Co. v. Lowery, 3 Ala. App. 511.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Copy to:
W. L. Darby,
Dr. R. B. McCain, Seale, Ala.

October 4, 1928.

Mr. Powell J. Darnell,
Shelby County,
Vincent, Alabama.

Dear Sir:

Offices—Mayor and Member County Board of Education.

Opinion by Assistant Attorney General Rayburn.

I have your letter of September 27th, 1928, in which you state that the mayor-elect of the Town of Vincent is now a member of the Board of Education of Shelby County.

You request my opinion:

Is the holding of said offices in violation of Section 280 of the Constitution of the State of Alabama?

It is my opinion that both offices named by you are public offices of profit under this State, and within the scope and purview of said Section of the Constitution. That is to say, it is a violation of this Section for one person to occupy the office of Member of the Board of Education and Mayor of the Town of Vincent, at the same time.

Having decided that both positions here considered are positions of profit, the remaining question for solution is, are both positions "offices" under this State? If the office is created, the officer appointed or elected, his powers prescribed, salary fixed and duties, defined, by an Act of the Legislature, then one holding such an office holds a public office under this State.

Montgomery v. State, ex rel. Enslen, 107 Ala. 382;

Lacey v. State, 13 Ala. App. 227.

This opinion is in keeping with an opinion heretofore rendered by the Attorney General on October 12, 1925, Opinions of Attorney General, 1925, Vol. 3, p. 309 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The State Tax Commission,
Montgomery, Alabama.

Gentlemen:

No law by which State Auditor or Tax Commission can refund money paid erroneously for licenses after same has been paid into the State Treasury.

Opinion by Assistant Attorney General Smith.

I have your letter of June 19, 1928, in which you submit the following statement of facts:

"Sub-division b of Section 3 of House Bill 419, Act of the Legislature, 1927, provides for a tax of three per cent on the gross income of busses, etc., **except jitney busses.**

"A person took out a license for the operation of a jitney bus. This was the correct license to be taken out under the definition of a jitney bus in the law providing for such license. This person under a misunderstanding of the law, paid to this Commission \$54.75, this amount being three per cent of the gross income received from the operation of the jitney bus for the three months ending December 31st, 1927. This person, of course, did not owe this amount since jitney busses are not subject to this tax."

Upon this statement you request the opinion of the Attorney General on the following question of law:

Is there any method by which the State Auditor or this Commission can refund the amount paid as herein stated.

In my opinion the only way money paid for licenses, through mistake or error can be refunded is provided for in Section 375 of the Acts of the Legislature, 1919, p. 45, which is as follows:

"Any person who through a mistake or error on the part of the judge of probate has paid to the judge of probate money that was not due from him for such license, or by such mistake has paid to the judge of probate for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded to him the amount in either event so erroneously collected by the judge of probate, and the provisions of this section shall apply to cases where money has heretofore been erroneously paid within two years before the approval of this Act."

You will observe that this section only applies to money paid for licenses through a mistake or error on the part of Probate Judges. I am unable to find any law authorizing the State Auditor or Tax Commission to make a refund as described in your letter.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

Judge of Probate,
Autauga County,
Prattville, Alabama.

Dear Sir:

When poll tax must be paid in order to vote.

Opinion by Assistant Attorney General Haynes.

I have your letter of October 1, 1928.

You desire my opinion on the following matter:

Can a person who has been duly registered but who did not pay his poll tax for last year and was, therefore, left off the qualified list prepared by the judge of probate for the election, 1928, vote in the general election of November 6th, of this year if he should pay up all back poll tax the first of October, 1928?

In reply to this question will say that he cannot vote in the general election, 1928, for the reason that Section 361, Code of Alabama, 1923, on qualifications of electors to vote provides among other things "* * * that an elector in Alabama before he can vote shall have paid, **on or before the first day of February next preceding the date of the election at which he or she offers to vote**, all poll tax due from then for the year 1901 and for each subsequent year."

It is plain from the above that all poll tax must be paid on or before the first day of February of the year in which the party offers to vote. Therefore, one having failed to pay his poll tax as set out above he could not qualify as an elector under the laws of this State by paying all poll tax due on October 1, 1928, so as to be able to vote in the general election, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

Clerk, Circuit Court,
Houston County,
Dothan, Alabama.

Dear Sir:

Lost witness certificates.

Opinion by Assistant Attorney General Haynes.

I am in receipt of your letter of August 18, 1928.

You request my opinion as follows:

I would appreciate it if you would advise me the proper procedure where parties either in criminal or civil cases lose their witness certificates.

If a witness certificate is lost your docket will show the date of issuance and the amount and the number of the certificate. Before you pay the same you should require the party claiming the amount shown due, to make an affidavit as to its loss, stating the amount, the date of same and that it has not been paid, sign and swear to same. You should then place this affidavit in your files for your protection.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Dear Sir:

Counties not authorized to pay for the feeding of prisoners except in cases of juvenile and insane persons.

Opinion by Assistant Attorney General Smith.

This is to acknowledge receipt of your letter of July 17th, 1928, in which you request my opinion on the following question:

Whether or not the county is authorized to pay for the feeding of prisoners who have escaped from the county jails in cases where the State has refused to pay the sheriff for feeding such prisoners?

I am of the opinion that under an Act of the Legislature of 1923, page 704, and an amendatory Act of the Legislature of 1927, page 693, that the county through its commissioners court or board of revenue is without authority to pay for the feeding of prisoners except juvenile prisoners and insane persons.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Copy to:
State Prison Inspector,
Chief Examiner of Accounts.

October 4, 1928.

The Judge of Probate,
Lee County,
Opelika, Alabama.

Dear Sir:

Skating Rink exhibitions are not subject to license on theatrical shows, but are subject to license tax under Schedule 97, Act of Legislature 1919, page 430.

Opinion by Assistant Attorney General Smith.

I have your letter of August 1st, 1928. You state that a certain skating rink is temporarily located in a municipality, and that an admission fee is charged for entering said skating rink, not only for those who skate therein but also to spectators, and that certain skating exhibitions are had in said rink. You further state that said rink is operated under a tent which shuts off the view of outsiders.

You request my opinion:

Is such a skating exhibition a "Theatrical show" within the contemplation of Section 16, of an Act approved July 22nd, 1927 (General Acts, 1927, p. 156)?

It is my opinion that the skating exhibitions which are held as stated by you are not theatrical shows within the purview and scope of Section 16 of the Act approved July 22, 1927 (General Acts 1927, p. 156), and, are therefore, not subject to the license tax provided in said section.

Section 16 of said Act reads in part as follows:

"Each person, firm or corporation operating or conducting vaudeville, theatrical shows as transient, operating temporarily in different places in tents or otherwise, shall pay to the State a license, etc. * * *"

However, skating rinks as described in your letter are subject to a license tax under Schedule 97 of the Revenue Act of 1919, page 430, which is as follows:

"SKATING RINKS:—For each skating rink, twenty-five dollars, provided that skating rinks owned and operated by municipalities shall be exempt."

Said licenses schedule is in full force and effect in this State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The Sheriff,
Butler County,
Greenville, Alabama.

Dear Sir:

State Prison Inspector has to condemn jails under Section 4855 of the Code—misdemeanor for violating said statute.

Opinion by Assistant Attorney General Smith.

This is to acknowledge receipt of your letter of August 22, 1928, in which you state as follows:

"Our jail here was closed on July 17th by the Jail Inspector, Dr. Andrews, and I was notified by him not to use it even temporarily. Now we had County Court here Monday and several parties were convicted and held in my custody and the Judge of Probate who is Judge of the County Court authorized me to put them in this jail. One is still in jail being sent to hard labor and the transfer agent being promptly notified. It looks as if they have me between the devil and the deep sea and I will be glad if you will give me an opinion along this line."

Upon this statement of facts you request the opinion of the Attorney General on the following question:

Has the State Prison Inspector authority to condemn and close jails?

I am of the opinion that this matter is fully covered by Section 4855 of the Code which is as follows:

"Power to Condemn Jails.—The inspector, subject to appeal to the governor, may condemn jails, prisons and almshouses, and may prohibit the further use of the same for the confinement of prisoners or inmates, when, in the opinion of the inspector, the unsanitary or insecure conditions warrant it."

I am of the opinion that the above quoted Section gives the State Prison Inspector full authority to condemn jails and may prohibit the further use of same for the confinement of prisoners when in his opinion the jail is unsanitary or insecure conditions warrant it. This, however, is subject to an appeal to the Governor.

I am informed that after an order was issued by the State Prison Inspector dated July 13, 1928, to close the jail in Butler County that there was an appeal made to the Governor to revise the order of the State Prison Inspector and that the Governor refused to change the order of said Inspector. It necessarily follows that this leaves Section 4855 in full force and effect in its operation.

I further wish to call your attention to Section 4863 of the Code which provides that if any sheriff, member of commissioners court or board of

revenue, wilfully fails or refuses without good excuse to obey such order, such person shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars nor more than five hundred dollars.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The Chief Examiner of Accounts,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Costs in liquor cases—seizure, mileage, etc., when and how paid.

Opinion by Assistant Attorney General Rayburn.

I have your letter of July 18th, 1928.

You request my opinion:

From what fund is the sheriff due costs for seizure and mileage when the defendant is sentenced to imprisonment in the penitentiary, or to hard labor for the county?

It is my opinion that in sentencing the defendant to hard labor for costs in prohibition cases, the fees for seizure, mileage and transportation should be included.

Section 4654, Code of Alabama, 1923. *Amiss vs. O'Rear, Sheriff*, 104 So. 885. *Opinions of Attorney General, 1927, Series IV, p. 375.*

Section 4039, Code of Alabama, 1923, as amended February 18, 1927, (General Acts, 1927, p. 45) provides the method and manner of payment of fees for the fine and forfeiture fund. Fees for mileage, seizure and transportation in liquor cases are proper charges against the fine and forfeiture fund upon a compliance with Section 4039, Code of Alabama, 1923, as amended February 18, 1927 (General Acts, 1927, p. 45).

Report of Atty. General 1918-20, pp. 255, 630.

Report of Atty. General 1920-22, p. 353.

Where a defendant is sentenced to hard labor for a sufficient number of days at seventy-five cents per day to pay the costs, no execution can be issued against said defendant, and there is no fund from which the sheriff is due costs for seizure and mileage in liquor cases. In such a case the Convict Department pays only the costs provided by statute, and there is no provision of law for the payment of seizure and mileage by said department. That is to say, where execution may not legally be issued in case of a con-

viction, the fees here considered are not a legal charge against the fine and forfeiture fund of the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

President, State Board of Administration,
CAPITOL.

Dear Sir:

Sand and gravel—State's ownership of same in beds of streams.

No authority in State Board of Administration to dispose of same

Opinion by Attorney General McCall.

I have your letter of February 2nd, 1928.

You state that the Governor is desirous of making charges against, and collecting for, sand and gravel removed from the beds of streams in the State of Alabama.

You request my opinion:

1. Has the State Board of Administration authority to make contracts covering or embracing the sale of sand and gravel which may be removed from the beds of streams within the confines of the State of Alabama?

2. If said Board has not such authority, in whom does such authority repose?

In answer to your questions, it is my opinion that the beds of navigable streams within the State of Alabama have never been ceded to the Federal Government by the State of Alabama. The State of Alabama having never deeded, ceded, or yielded in any way its right, title and interest in and to the beds of navigable streams, still possesses a fee simple title in and to said property.

Mayor of Mobile vs. Eslava, 9 Port. 577; Webb vs. Demopolis, 95 Ala. 116; Williams vs. Glover, 66 Ala. 193; State ex. rel. vs. Ala. Power Co., 176 Ala. 625; Mobile Transportation Co. vs. Mobile, 187 U. S. 482.

However, I know of no law that would authorize the Board of Administration to sell sand and gravel from the beds of navigable streams, and, in my opinion, said Board has no such authority.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 4, 1928.

The Sheriff,
Marengo County,
Linden, Alabama.

Dear Sir:

Removal fee of sheriffs.

Opinion by Assistant Attorney General Haynes.

I have your letter of June 18th, 1928.

You request my opinion on the following matter:

Am I entitled to removal fee for prisoner who has forfeited his bond, and for whose arrest an alias capias has been issued, and who is arrested by the sheriff of another county and placed in jail on failure to make bond?

It is my opinion, that you are. Section 3758, Code of Alabama, 1923, provides that the sheriff shall receive for his services in the county court, the same as is provided for like services in the circuit court. Section 3741, Code of Alabama, 1923, provides in part as follows:

"For removing any prisoner upon a change of venue granted in his case, or who is arrested on a warrant issued by a justice of the peace, or on an indictment, and confined in a county other than that in which he is triable or arrested for contempt, or as a defaulting witness, * * *"

Construing the said sections together, I think it is plain that you are entitled to removal fee in the case stated by you.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928.

State Tax Commission,
CAPITOL.

Gentlemen:

Nickle-in-the-slot machines—Weighing machines. Payment of license on when owner unknown.

Opinion by Assistant Attorney General Smith.

I have your letter of June 29, 1928. In it you state that certain license inspectors have requested you to advise them how they can collect licenses on nickle-in-the-slot machines, principally weighing machines, which are not operated in any regular place of business and the owners are unknown.

You request my opinion:

How can licenses be collected on weighing machines when the owners of such machines are unknown?

In my opinion, the license on such machines is to be paid by the person, owner or proprietor of the establishment, store, or place of business in or at which such weighing machine is located, provided that it is either owned, **operated** or allowed to be operated in or at the place of business.

I understand from your letter that the machines are located on the pavement in front of places of business and that the owners of such business claim that they do not own the machines and that they do not know the owners.

Schedule 117, Section 361, (General Acts of Alabama, 1919, p. 437), is as follows:

"Weighing Machines.—For each weighing machine having a penny-in-the-slot, or other device of like character, five dollars. This license shall be due and payable by the person, owner or proprietor of the establishment, store or place of business, in or at which such weighing machine is located."

You will observe from the above that the license on such machines are due and payable by the owner of the business at which the machines are located, but of course ownership of the machines must be proven or that the machine is operated or allowed to be operated by the proprietor or owner of the store or place of business.

I am of the opinion that where the owner or operator is unknown and cannot be ascertained, and that the machine is found on the streets with no one in possession or claiming same, that the license inspector would be justified in taking possession of the machine, until the owner or operator claims same, and when said machine is claimed and the license is not presently paid then attachment may be brought against the owner or operator, as provided in Schedule 73 of Acts of the Legislature, 1919, page 423.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928.

The Superintendent,
State Bureau of Insurance,
CAPITOL.

Dear Sir:

Insurance premium—collection as entrance or joining fee is part of gross premium under Section 3 (b) Acts of Legislature, 1927, page 149.

Opinion by Assistant Attorney General Smith.

I have your letter of August 24, 1928, in which you submit the following statement of facts:

"Certain life insurance companies operating in this State have a practice among their agents of collecting from the applicant for insurance what is known as 'an entrance or joining fee.' This entrance or joining fee is not included with the amount of premiums which the company is required to report to this Department and pay the tax thereon as required in Section 3 (b), page 149, of General Acts of Alabama, 1927."

Upon this statement of facts you request the opinion of the Attorney General on the following question:

Whether or not I as Superintendent of Insurance am required to collect the premium tax of two per centum required by said section of Acts of 1927 on the amount of this entrance fee or joining fee.

In answer to your question it is necessary to determine the legal definition of the word **premium**. The word premium as used in relation to insurance, is the **total sum** the insured is required to pay for the privilege of being protected under the contract of insurance, commonly known as a policy.

Words and phrases, (New Series), Vol. 8, p. 1147.

In accordance with the above definition of the word premium, I am of the opinion that an entrance or joining fee is a part of the gross premium as used in Section 3 (b) page 149, of the General Acts of the Legislature of 1927, and it necessarily follows that you should require the insurance companies to pay the two per centum premium tax on these so-called entrance or joining fees collected by them as such sums so collected are nothing more or less than a premium on the policy so issued.

Yours truly,
CHARLIE McCALL,
Attorney General.

October 5, 1928.

The Tax Collector,
Montgomery, Montgomery County, Ala.

Dear Sir:

Ad valorem taxes paid to Tax Collector of county in which property is assessed.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of October 3, is acknowledged.

You ask the following questions:

1. Can a tax payer legally pay into the State Treasury the ad valorem taxes assessed upon his property for State purposes by the tax

assessor of the county instead of to the county tax collector?

2. Is the State Treasurer legally authorized to receive from a tax payer such tax payer's State taxes and to issue to the tax payer a receipt binding on the tax collector?

3. Does the law authorize a tax payer to pay his State taxes to the Tax collector at one time and his County taxes at another and different times, and if so, is the Tax Collector compelled to accept payment of taxes in such manner, or should the Tax Collector insist that the tax payer pay to him both State and County taxes at the same time?

In answer to your first and second questions, will say that, in my opinion, there is no authority of law for such a course to be taken in the payment of such taxes.

Article 5, Code of Alabama, 1923.

Folsom v. Carnley, 210 Ala. 136.

In answer to your third question will say that, in my opinion, from the first day of October of any year, when taxes become due and payable until the first day of January succeeding, when taxes become delinquent, a tax payer may pay his state taxes to the Tax Collector without payment of his county taxes, and that it becomes the duty of the Tax Collector, when so tendered, to receive and receipt therefor.

Article 5 of Code, supra.

Wise v. State, 208 Ala. 58.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928.

The Alabama Real Estate Commission,
CAPITOL.

Gentlemen:

Authority of Real Estate Commission to make rules and regulations.

Persons handling their own property, and their employees exempt from payment of license.

Opinion by Assistant Attorney General Koonce.

I have your letter of July 12, 1928.

You request my opinion:

1. Can the Real Estate Commission require an applicant for license to devote as much as four-fifths of his or her time to the real estate business?

2. Can the Real Estate Commission refuse to grant license to per-

sons who are at the same time engaged in other than the real estate business?

3. Can the Real Estate Commission require an applicant for license to take an examination?

4. Must a person pay license if he works on commission for a company, co-partnership or corporation owning and dealing only in its own property?

In my opinion the Real Estate Commission cannot require an applicant for license to devote as much as four-fifths of his or her time to the real estate business. Section 5 of an act approved August 27, 1927, which act created the Real Estate Commission, contains the following:

"The Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Act."

The above provision only authorizes the Commission to make such rules and regulations as are necessary to carry out the provisions of the Act referred to above. There is nothing in the Act which requires an applicant for license to devote four-fifths of his or her time to the real estate business. Therefore, the Commission has no authority to make such provision, because such action by the Commission would not be the making of rules and regulations but would be the making of a new provision of law.

In my opinion the Real Estate Commission cannot refuse to grant license to persons who are at the same time engaged in other than the real estate business. The reasoning which I have applied above to your question numbered one also applies to question two.

In my opinion the Real Estate Commission can require an applicant for license to take an examination in order to ascertain if license should be granted. Section 4 of the Act referred to above, by implication, authorizes such examination.

In my opinion a person who works on commission for a company, co-partnership or corporation owning and dealing only in its own property, is not required to pay license. Section 2 of the Act referred to above contains the following:

" * * * The provisions of this Act shall not apply to any person, co-partnership, association or corporation, who as owner or lessor shall perform any of the Acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property, and the investment therein * * *"

The above provision of Section 2 exempts owners of property and their employees from payment of license. This exemption to employees applies whether or not such employees are paid a salary or work on commission.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928

Superintendent of Education,
Tallapoosa County,
Dadeville, Alabama.

Dear Sir:

Special three mill district tax. Division of districts for by County Board of Education.

County Board of Education authorized to have maps of school districts made. Compensation therefor.

Opinion by Assistant Attorney General Rayburn.

I have your letter of June 9th, 1928.

You state that Tallapoosa County has revoted the countywide three mill tax, effective September 30th, 1928, and that, in the near future, the County Board of Education of said County proposes to petition the Court of County Commissioners to call an election for the purpose of voting on the special three mill district tax.

You further state that said County Board desires to divide Tallapoosa County into two districts, placing Alexander City, which is a separate school unit, in one district, and the remainder of the County in the other district.

You also state that Section 270 of Article 13, School Code of Alabama, 1927, gives authority to the County Board of Education to have a map of said districts made, but is silent as to compensation for such work.

You request my opinion:

1. Does the County Board of Education have the authority to divide the County into two districts for the purpose, and in the manner, suggested above?
2. Is it legal for the County Board of Education to appropriate money to pay for the making of a map or maps of said district or districts?

In answer to your first question, will say no. I herewith enclose a copy of an opinion heretofore rendered by the Attorney General, on to-wit, July 26th, 1927 (Opinions of the Attorney General, 1927, Vol. 2, p. 325, Office Edition), which deals with the subject of your inquiry and will give you the desired information. See, also, Opinion of the Attorney General, 1924, Vol. 2, p. 607 (Office Edition).

In answer to your second question, it is my opinion that the County Board of Education is authorized by law to appropriate part of the special county three mill tax or bonus fund to cover the preparation of a map or maps of said school district or districts.

Section 270, Alabama School Code, 1927, reads as follows:

"270. District Boundaries Fixed by County Board.—In order to make it possible to work out a system of local tax units adapted to the needs of the whole County, the County Board of Education of its own initiative shall fix the boundaries of any school district within its jurisdiction in

which it is proposed to levy a local school tax. In making application for a special election in any such district, the County Board of Education shall submit a map made by the County Surveyor, or other "competent person, showing the boundaries of the school district for which a special tax levy is proposed, indicating the section or sections and ranges, together with the correct description of the boundaries of the said district for which a special tax levy is proposed. These maps shall also show the location of public utilities, such as power plants, railroad and telegraph lines, if any, in such districts, and the railroad mileage for each and every corporation having property therein. The County Superintendent shall include a full and correct description of such boundaries in the minutes of the County Board of Education, and shall also furnish a full and correct description of such boundaries, including a map, to the Probate Judge, who shall record the same in a book to be kept by him for that purpose, also to the State Department of Education and to the State Board of Equalization, or other board exercising corresponding powers, including as many copies of such map as there are public utilities."

Inasmuch as the submission and preparation of a map is made mandatory by the above quoted sections upon the County Board of Education, and provision is not specifically made for payment otherwise, the payment for such work by the County Board of Education is legal when made from the funds hereinbefore mentioned.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Oct. 5, 1928

Clerk of the Circuit Court,
Butler, Choctaw County, Ala.

Dear Sir:

Solicitor's fee in revenue law violations.

Opinion by Assistant Attorney General Rayburn.

I have your letter of June 22, 1928. You state that a certain party was convicted at the February term of the County Court of Choctaw County for violating the revenue law, and that he was fined by the Judge for said violation, and took an appeal to the Circuit Court. The defendant entered a plea of guilty "of an attempt to commit the offense of labor agent without license." For said offense the defendant was fined \$5.00.

You request my opinion:

What is the proper solicitor's fee in both the County Court and the Circuit Court, under the foregoing statement of facts?

It is my opinion that \$30.00 is the proper solicitor's fee for violating the revenue law in the county court.

Section 3738, Code of Alabama, 1923, provides for fees and commissions of solicitors. Not finding a fee in said Section for the particular violation named by you, we looked elsewhere in order to ascertain the amount of fee due the solicitor in such a case.

Section 3738, provides as follows:

“***for each conviction of a violation of the revenue law, not otherwise provided for. . . \$30.00***”

A sub-section of Section 3738, Code of Alabama, 1923, reads as follows:

“For every conviction of a misdemeanor in the County Courts or Inferior Courts there shall be taxed and collected as a part of the costs and paid into the County Treasury the same solicitor's fees provided for convictions in such cases in the Circuit Court; on an appeal to the Circuit Court the same shall be taxed as a part of the costs in addition to the solicitor's fee taxed for such conviction in the Circuit Court, and this solicitor's fee previously taxed in the County Court or Inferior Court shall be paid, when collected, into the County Treasury.”

Opinions of Attorney General, 1927, Vol. 3, p. 195, et seq. (Office Edition).

This opinion is based upon the assumption that a conviction was had for the offense of acting as a labor agent without a license therefor. There is no such offense known to the law of Alabama as an “attempt to commit the offense of labor agent without license.” Some attempts to commit certain crimes are declared to be misdemeanors, but not so with the attempt named in your inquiry.

If the person was convicted in the Circuit Court for “An attempt to commit the offense of labor agent without license” no solicitor's fee can attach, because there is no such offense.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Sheriff's fees—delivering ballot boxes; commission on county court costs.

Opinion by Assistant Attorney General Rayburn.

I have your letter of June 28, 1928, in which you enclose copy of a letter from a special assistant to the department of Examiners of Accounts.

Based on said letter you request my opinion:

1. Is the sheriff entitled legally to compensation for services rendered in delivering ballot boxes to election officers?
2. Is a sheriff legally entitled to commission on county court costs collected and paid over to the county treasurer?

In answer to your first question, I advise you that the only compensation which is legally allowed a sheriff for the various duties which devolve upon him in the matter of holding elections, is found in Section 509, Code of Alabama, 1923. When the sheriff acts in the capacity of a returning officer he is entitled to \$2.00 and five cents a mile in going to the courthouse and returning to the place of holding the election.

Section 446, Code of Alabama, 1923, states:

"The sheriff of each county or the person discharging the duties of such office, is the returning officer for his county."

Thus, it is seen that the sheriff is entitled to the compensation named in Section 509, when he is acting as the returning officer.

The sheriff is compensated for the various other duties required of him in the conduct and management of elections in the compensation allowed him for ex-officio services.

In answer to your second question, I advise you that there is no authority of law for the retention by the sheriff of a commission on county court costs collected by him and paid into the county treasurer.

The law of costs and fees is penal in its nature, and, therefore, no costs or fees can be legally collected, in the absence of an express provision therefor.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928.

The Judge of Probate,
Birmingham, Jefferson County, Ala.

Dear Sir:

Half year's license can be issued under Sections 4 to 12 inclusive of an Act approved July 22, 1927 (General Acts 1927, p. 186).

Opinion by Assistant Attorney General Brassell.

I have your letter of June 28, 1928.

You request my opinion:

Advise if half year's license tax be issued under Sections 4 to 12 of an Act approved July 22, 1927 (General Acts, 1927, p.p. 153-154, 155-186).

In answer to your question, I am of the opinion that a half year's license can be issued under Sections 4 to 12 inclusive of an Act approved July 22, 1927 (General Acts, 1927, p.p. 153-154-155-186) Section 76 p. 186.

Opinions of Attorney General, Book 5, (Office Edition p. 111).

The legislature acting within its legislative competency has levied an annual license tax upon persons engaged in certain professions, but has made provision under the Act *supra* for the issuance of half year's license tax under Sections 4 to 12 inclusive.

Section 76 of the Act:

Section 76. LICENSE MAY BE ISSUED FOR HALF OF YEAR WHEN BUSINESS COMMENCED AFTER APRIL FIRST; LAST PRECEDING FEDERAL CENSUS GOVERNS POPULATION. If any business licenses by this Act shall commence after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases the license shall be taken out for the full term of one year, unless a shorter term is fixed by the provisions of this Act. In all cases where the amount of license is rated according to the population of the town, city or county, the population of such town, city or county, as fixed by the last preceding United States Census shall govern."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1928.

Hon. Joseph E. Jones,
Evergreen, Conecuh County, Ala.

License for Civil Engineer.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of August 11, 1928, in which you state that a certain civil engineer is practicing his profession in Conecuh County, for and on behalf of a certain construction company.

You request my opinion:

Is said engineer legally subject to a privilege license?

I advise you that said engineer is due the State of Alabama twenty-five (\$25.00) dollars as a privilege license, by virtue of Section 10 of an Act approved July 22, 1927 (General Acts, 1927, p. 155). Said section reads as follows:

"Each person practicing the profession of civil, electrical, mining or mechanical engineering, shall pay an annual license of Twenty-five (\$25.00) Dollars to the State but no license shall be paid to the county."

If such business is conducted as a firm or corporation in which more

than one engineer is engaged, each engineer so engaged shall pay a license of Twenty-five (\$25.00) Dollars.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

The State Tax Commission,
CAPITOL.

Attention: Mr. Brassell.

Gentlemen:

Property owned by a person or corporation that operates a State or County Fair, and not used for such purpose, not exempt from taxation.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of former date is acknowledged. You make statement of facts:

The Alabama State Fair Association owns real estate, buildings, etc., which are used for Fair purposes and in addition it owns real estate which has been leased by them for a period of ten years as an amusement park. In addition to this it owns other real estate which is not used for operating a fair.

You wish to know if the property leased as above stated and other property owned but not used for fair purposes is exempt from taxation either by Section 3026 of the Code or by subdivision (h) of Section 2 of the Revenue Act 1923, Acts 1923, p. 154.

In reply will say that if Section 3028 of the Code, 1923, was valid when the Act adopting the Code was approved August 17th, 1923, it was repealed by said Revenue Act, which was approved August 22nd, 1923. Section 2 of this Act reads in part as follows:

The following property and persons shall be exempt from ad valorem taxation and none other:

“*** (h) That no license or taxation of any character, except franchise taxes provided by Section 229 of the Constitution of the State of Alabama, shall be collected or required to be paid to the State or any county or municipality therein, by any State or County fair, agricultural association, stock kennel or poultry show, athletic stadium owned and controlled by universities, schools or colleges, and which are used exclusively for promoting inter-collegiate or inter-school athletics, etc.”

It will be seen from reading the foregoing quotation that the exemption is to the “fair.” It does not include property which is no part of the fair. To construe the statute to mean that an individual or corporation that operates a fair shall be exempt from taxation on property that has no use for fair purposes—property of a use and kind that all others than such individual or corporation must pay taxes upon,—would render the part of said section above quoted void as an inadmissible classification. In other words, it would

be inadmissible to exempt from taxation all men named John Jones while taxing men of all other names upon the same kind of property, used for the same purpose, that is exempted to the John Joneses.

I am, therefore, of the opinion that all property not used for fair purposes is taxable.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

The Judge of Probate,
Moulton, Lawrence County, Alabama.

Dear Sir:

Sinking fund pledged by the county for the payment of interest bearing warrants not deducted in computing indebtedness of county under Section 224 of the Constitution of 1901.

Opinion by Assistant Attorney General Brassell.

I have your letter of June 19th, 1928, relating to sinking funds created by virtue of Sub-Section 22 of Section 6755, Code of 1923.

You request my opinion:

Are funds collected, and set aside to the sinking fund by the county for payment of interest bearing county warrants under Code of 1923, to be deducted from Lawrence County's indebtedness in determining the constitutional debt limit of said county?

In answer to your question I am of the opinion that, in determining the constitutional debt limit of Lawrence County any sums set aside as a sinking fund cannot be deducted in determining the constitutional debt limit under Section 224 of the Constitution of 1901.

Biennial Report of Attorney General, 1914-16, pp. 67-127.

Section 224 of the Constitution of 1901, deals with liabilities and not assets. To illustrate this point Lawrence County's indebtedness might be one million dollars, and a sinking fund for the payment of such indebtedness might contain four hundred thousand dollars, yet Lawrence County would owe the principal sum of one million dollars.

Mr. Webster defines a sinking fund as follows:

"The aggregate or sums of money set apart and invested, usually at fixed intervals for the extinguishment of the debt of a government, or of a corporation by the accumulation of interest."

It matters not what sum should be in the sinking fund of Lawrence County, it cannot be deducted from the amount of the county's public indebtedness until the assets thereof have been used in extinguishment of the county's liabilities.

Sisk vs. Cargile, et al, 138 Ala. 164.
Travis et al vs. First National Bank of Evergreen, 98 So. 890.
Troy National Bank vs. Russell County, et al, 291 Fed. 185.
Smith vs. Austin, 200 Ala. 472.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

Judge of Probate,
Clarke County, Grove Hill, Alabama.

Dear Sir:

Construction of Schedule 80 of Section 361, Revenue Act, 1919, Acts 1919, page 425.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of September 14th is acknowledged. You state, as facts, the following:

A person operates an ice house. He buys ice and stores it in his ice house. He takes orders for ice at his place of business by telephone as well as sells ice at ice house. He does not send out ice to be sold at retail at residence or elsewhere, for personal use of buyer.

You ask if, under the facts stated, such dealer is due a peddler's license.

In reply will say that where an order for ice is given over the telephone to place of business of ice dealer and there accepted, the sale is made at the dealer's place of business, and the mere fact of delivery by the ice dealer, after such selling, does not constitute peddling. Where there is no peddling, no peddler's license is required.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

Probate Judge ,
Colbert County, Tuscumbia, Alabama.

Dear Sir:

Interstate commerce; dealer who solicits orders for sale of automobiles in Alabama to be delivered in Mississippi, not liable for license.

Opinion by Assistant Attorney General Smith.

I have your letter of June 12, 1929, in which you state that an automobile dealer who has his established place of business in the State of Mississippi, came into this State with a demonstration car, and obtained a buyer for an

automobile, but required his customer to go into Mississippi to obtain delivery of said car purchased by him.

Upon this statement of facts you request the opinion of the Attorney General as follows:

Is such dealer under the above statement of facts liable for the payment of license for selling automobiles under the laws of Alabama?

I am of the opinion that a dealer who has his established place of business in Mississippi and takes orders for cars in this state, and delivers the cars so purchased in the State of Mississippi, is not subject to the license tax on dealers or sellers of automobiles as provided for under the revenue laws of this State. Where a sale is made by an agent or an order is solicited by him, and the delivery of the goods in consummation of the sale or in the filling of the order requires their transportation from one State to another, the transaction is one of interstate commerce.

Crum v. The Town of Prattville, 155 Ala. 154.

Lee v. LaFayette, 153 Ala. 675.

Citizens National Bank v. Bucheit, 71 So. 82.

Wright v. The State, 8 Ala. App. 14.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

State Tax Commission,
CAPITOL.

The "fifteen per cent penalty," which Section 256 of the Motor Vehicle Act (Acts 1923, pages 294, 295) provides shall be paid to License Inspectors, does not apply in convictions under the provisions of Sections 20, 21 and 24 of said Act.

A ten per cent penalty for the benefit of the License Inspector is provided for in Section 21 of said Act.

No pay for benefit of License Inspector is provided for in Sections 20 and 24 of said Act, except certain costs that must be taxed where he performs certain acts with reference to the prosecution.

Opinion by Assistant Attorney General Evans.

Dear Sir:

By letter of April 10, 1928, you request an opinion upon the following propositions:

1. Does the "fifteen per cent of penalty" which Section 25-b of the Motor Vehicle Act (Acts 1923, pages 294 and 295), provides shall be paid to License Inspectors, apply in prosecutions for violating the law as set forth in Sections 20, 21 and 24 of said Motor Vehicle Act?

2. If the License Inspector is not entitled to such "fifteen per cent penalty" in prosecutions for violations of the law as set forth in Sections 20, 21 and 24, is there any other provision of law which provides any pay for License Inspectors in prosecutions under said Section?

In reply to your first question, will say that said Section 25-b, except the last sentence thereof, deals only with the duties of License Inspectors with reference to those who are delinquent in paying license due by them.

The "fifteen per cent of the penalty", there provided to be paid to the License Inspector, is where the License Inspector institutes a prosecution against such delinquent for failing to take out license as provided by law.

In answer to your second question will say that the last sentence of section 25-b provides as follows:

"License Inspectors shall have the same power to arrest persons violating the revenue laws of the State, as is now vested in the sheriffs of the State, and shall receive the same fees for such service."

It will be seen from the foregoing that the License Inspector has authority to arrest any person violating the revenue laws of the State, and, when he does so he is entitled to the same fees as a sheriff would be entitled to for like service.

The last sentence of said section 21 provides as follows:

"License Inspectors are authorized to arrest any dealer making use of a demonstration tag except as provided in this section, and such inspector shall be allowed a fee of ten per cent of any fine or penalty imposed for violating this section by such dealer, which fee shall be paid by the dealer in addition to the fine or penalty."

Other than the foregoing provisions—one constituting the last sentence of said section 25-b and the other constituting the last sentence of said section 21, we know of no compensation to License Inspectors in prosecutions for violating the revenue laws of the State other than the "fifteen per cent of the penalty" provided in said Section 25-b, in case of prosecution instituted by the License Inspector against delinquents for failing to take out license as required by law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

Judge of Probate,
Pike County,
Troy, Alabama.

Dear Sir:

Latest date on which candidate may qualify for county office.

Opinion by Assistant Attorney General Haynes.

I have your letter of September 27, 1928, in which you state that you are

likely to have an independent candidate in your county for Judge of Probate and you desire to know the latest time at which he may qualify as an independent candidate and be placed on the ticket for the general election which will be held in Alabama the coming November.

In order intelligently to pass upon the question I am of necessity compelled to construe sections 462 and 407 of the Code of Alabama, 1923 together, and in doing this I find an irreconcilable conflict. Section 407, *supra*, is as follows:

"Ballots, etc., delivered to probate judge.—Not less than thirty-one days from the time of the holding of any general, special or municipal election, authorized by law, the officers charged with the printing and distribution of the official ballots shall cause to be delivered to the probate judge of each county in which said election is held a sufficient number of ballots and other printed matter required hereunder."

Section 462, *supra*, is as follows:

"Names of candidates placed on ballots; certificate of nomination.—The probate judge of each county shall cause to be printed on the ballot to be used in their respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in this state, and certified in writing and filed with him not more than sixty days nor less than twenty days previous to the day of election. The certificate must contain the name of each person nominated and the office for which he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting or other assembly, or by the chairman and secretary of the canvassing board of such primary election, and their signatures must be duly acknowledged by one or more of them before an officer authorized by law to take acknowledgments. The judge of probate shall also cause to be printed upon the ballots the name of any qualified elector who has been requested to be a candidate for any state, county, municipal or federal office by written petition signed, in case of a candidate for a state or federal office, by at least three hundred electors, and in case of a county or municipal office, by at least twenty-five electors qualified to vote in the election, to fill said office; when such petition has been filed with him not more than sixty days nor less than twenty days previous to the election. In case of a person to be voted for by the electors of the whole state or of an entire congressional district or judicial circuit, the certificate of nomination or the petition must be filed in the office of the secretary of state not less than thirty days before the day of election; and the secretary of state must thereupon immediately certify to the judge of probate of each county in the state, in case of an officer to be voted for by the electors of the whole state, and the judges of probate of the counties composing the circuit or district, in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him for that purpose, the fact of such nomination and the name of the nominee or nominees and the office to which he or they may be nominated. In case of a person to be voted for by the electors of a senatorial

district, the petition or certificate of nomination must be filed with the judge of probate of each county composing the senatorial district."

Section 407, *supra*, provides that all ballots and supplies shall be delivered to the judges of probate of the various counties in Alabama not less than thirty-one days before any general, special or municipal election.

Section 462, *supra*, provides that the "judges of probate of the various counties shall cause to be printed on the ballots names of all candidates who have been put in nomination * * * by * * * which are are filed with him not more than sixty days nor less than twenty days previous to the day of election."

It will be noted from the above quotations that we have a direct conflict in these two statutes.

Section 407, *supra*, provides that the ballots must be printed and in the hands of the judge of probate thirty-one days before any election. Section 462, *supra*, provides that the judge of probate shall have the names of all candidates properly certified not more than sixty days nor less than twenty days before any election, and printed on the ballot. To follow Section 407 the ballots must be printed and in the hands of the Probate Judge eleven days before the time limit set in Section 462, *supra*, for qualifying has expired. So as stated above we have an irreconcilable conflict and there is but one solution of the matter. Section 462 quoted above which is codified in our present code comes into it from the Code of 1907, and the Code of 1896. Section 407 is a new statute appearing for the first time in our present Code and is codified from an Act of the Legislature approved September 30, 1919. Therefore, where there is a direct conflict between two statutes or laws which cannot be reconciled, it has been uniformly held by our courts that the more recent statute must stand, and be construed to modify or amend the former statute. In other words, if the two statutes on the same subject are mutually repugnant, the later act without a repealing clause, operates to repeal the earlier act. We are mindful of the fact that laws are presumed to be passed with deliberation and with full knowledge of existing laws on the subject and it is but reasonable to conclude that in passing a statute it was not intended to interfere or abrogate any former law relating to the same matter, unless the later act is either repugnant to the former one, or fully embraces the subject matter thereof.

26 American & English Enc. of Law, 26, p. 721-723.

Ex parte Graham et als, 4 Ala. App. 244 (56 So. 1015).

Therefore, we are compelled by the reasoning above and the holding of our higher court to follow Section 407, and where it is in conflict with Section 462 adopt its wording and hold that this section providing that the ballot shall be in the hands of the probate judges of the various counties of Alabama at least thirty-one days before any election is tantamount to saying that all candidates expecting to be voted on at such election must qualify a reasonable time before the date at which the ballots are required to be printed and in the hands of the probate judge for distribution.

Again, to show this to be the only construction that can be placed on these two sections, Section 408, Code of Alabama, 1923, provides that the

judges of probate of the various counties shall deliver to any absentee voter who may properly apply for same his ballot to be voted at the specified election and he is required to do this "not more than thirty days nor less than five days before said election."

Therefore, in order for the probate judge to be able to do this, Section 407, supra, requires that the ballots be printed and in his hands thirty-one days before the election.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

Hon. Woolsey Finnell,
Alabama Highway Director,
CAPITOL.

Dear Sir:

Construction of Section 9½ of Pamphlet "A" Alabama State Highway Department standard specifications, 1927, as applied to contract for construction of F. A. Project 171-B, a road in Madison County.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of October 8, 1928, is acknowledged. You wish my opinion as to how the balance due of 15 per cent on final settlement should be paid under the following state of facts:

On August 24, 1928, the State Highway Department entered into contract with Ralph M. Smith, Inc., for construction of F. A. Project 171-B, a road in Madison County. The work has progressed to completion and the final estimate for completion of said project is now due and payable by the State Highway Department.

On October 10, 1927, the said contractor, Ralph M. Smith, Inc., made the following written request to and authorization of the Highway Department of Alabama:

"State Road Department,
State of Alabama,
Montgomery, Alabama.

Gentlemen:

You are hereby requested and authorized to mail to the Tennessee Valley Bank, at Huntsville, Alabama, remittances for monies due us on monthly estimates for work done by us on Project No. F. A. P. 171-B, Madison County.

This arrangement to be effective until you are otherwise notified by the Tennessee Valley Bank and ourselves.

Yours very truly,
RALPH M. SMITH, Inc.
K. G. McDONALD, Treasurer."

In reply to your inquiry will say that to answer your question requires a construction of certain parts of the said contract between the State Highway Department of Alabama and Ralph M. Smith, Inc., in order to determine the meaning of "monies due on monthly estimates for work done by us on Project No. F. A. P. 171-B, Madison County, Alabama."

This feature of the contract is dealt with in Section 9-5 of the Contract and reads as follows:

"9½. Partial Payments: Partial payments will be made monthly, provided that the work is progressing to the satisfaction of the Highway Director. The total amount of such payments at any time, before final completion shall not exceed 85 per cent of the relative value of the work done, as estimated by the Highway Director. Estimates of the relative value of the work performed will be made by the Highway Director near the last of the month, in which the work was done, and payment therefor will be made about the tenth (10) day of the succeeding month.

Whenever the total amount of work provided for by the Contract shall have been completely performed on the part of the contractor and all parts of the work have been approved by the Highway Director, a final estimate showing the value of the work will be prepared by the Highway Director as soon as the necessary measurements can be made. The amount of this estimate, less any sums that may have been deducted in accordance with the provisions of the Contract will be paid to the Contractor within thirty (30) days after the final estimate is forwarded by the Highway Director, provided that the Contractor has properly maintained the road as hereinafter specified."

It will be noted in the above section of the Contract that payment due for monthly estimates "shall not exceed 85 per cent of the relative value of the work done, as estimated by the Highway Director."

The second paragraph of said Section 9½ provides for payment of final estimate and not for monthly estimates. No more than "85 per cent of the relative value of the work done, as estimated by the Highway Director," is due the Contractor on monthly estimates. The balance due after completion of the Project, is due, not on monthly estimates, but on final estimate. It thus appears that two kinds of estimates are provided for by the Contract, one called monthly estimates, made before final completion of the project and the other called final estimate, made on completion of the project. The amount due on monthly estimates is due and payable monthly, while the amount due on final estimate is due after all provisions of the Contract have been complied with.

It thus becomes clear, in my opinion, that the written order already copied in this opinion, covers monthly estimates only, and does not cover the final estimate. The amounts due on monthly estimates are the amounts due monthly, which is not exceeding 85 per cent of the relative value of the work done as estimated monthly by the Highway Director. While the amount due on final estimate, is the value of the whole work done in completing the project, less the amounts paid on monthly estimates.

It thus appears that the amount due on final estimate is not covered by the order of October 10, 1927, and should, in my opinion, be paid to the

Contractor where no other claim than the one already considered has been made or filed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 11, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Local Acts relieving Tax Assessors of duty of making books of assessments held constitutional.

Opinion by Assistant Attorney General Koonce.

I have your letter of June 29, 1928. In it you state that a number of local acts have been passed seeking to relieve the tax assessors of certain counties of the duty of preparing books of assessments such as are required under the Acts of 1923, page 176, Section 42.

You request my opinion:

Is a local act which relieves a tax assessor of the duty of making a book of assessment, violative of sections 96, 104, subdivision 15 and 108 of the Constitution of Alabama, 1901?

Local Acts have heretofore been passed relieving the tax assessors of the following named counties of the duty of making books of assessments:

- Blount County, Act approved Aug. 9, 1927, (Local Acts, 1927, p. 136);
- Chambers County, Act approved Aug. 11, 1927, (Local Acts, 1927, p. 193);
- Covington County, Act approved July 29, 1927, (Local Acts, 1927, p. 101);
- Etowah County, Act approved Feb. 15, 1927, (Local Acts, 1927, p. 14);
- Jackson County, Act approved Aug. 26, 1927, (Local Acts, 1927, p. 321);
- Lauderdale County, Act approved Aug. 2, 1927, (Local Acts, 1927, p. 124);
- Marshall County, Act approved Sept. 28, 1923, (Local Acts, 1923, p. 318);
- Morgan County, Act approved Sept. 4, 1923, (Local Acts, 1923, p. 127);
- Walker County, Act approved Sept. 24, 1923, (Local Acts, 1923, p. 226).

In my opinion all of the above Acts do not violate the Constitution of Alabama, 1901, Section 104, subsection 15, which is as follows:

"The Legislature shall not pass a special, private or local law regulating either the assessment or collection of taxes, except in connection with the readjustment, renewal, or extension of existing municipal indebtedness created prior to the ratification of the Constitution of Eighteen Hundred and Seventy-five."

To relieve a tax assessor by a local Act of the duty of making a book of assessments as required by the General Acts of 1923, page 176, Section 42, is not a regulation of the assessment or collection of taxes, but simply a change in the method of bookkeeping, and providing a simpler and less expensive method of keeping the records of tax assessments.

In considering the above local Acts I have constantly borne in mind the principle that when there is a doubt as to the constitutionality of a statute every reasonable presumption must be made in favor of its constitutionality. This principle has often been upheld by our Supreme Court.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 8, 1928.

Mr. S. B. Gibson,
County Superintendent of Education,
Anniston, Alabama.

Dear Sir:

As to the legality of County Board of Education of Calhoun County providing transportation for the rural school children who attend the normal training school.

Opinion by Assistant Attorney General Evans.

Your letter of September 6th is acknowledged. You state that for several years the County Board of Education of Calhoun County has furnished transportation to children from the rural districts of Calhoun County to the training elementary, junior high and senior high schools of the State Normal School at Jacksonville, Alabama.

This year, the County Board of Education, feeling that it might not be legal to transport pupils from the rural districts to the Normal Training School, passed a resolution to the effect that no pupil from the rural school districts who attends the Normal Training School will be permitted to ride on the county school busses running into Jacksonville, but that only pupils enrolled in the city schools will be permitted to ride on the county school busses.

You wish to know if the County Board of Education of Calhoun County can legally furnish transportation for school children from the rural districts of Calhoun County to the training elementary, junior high and senior high schools of the State Normal School at Jacksonville.

In reply will say that it is my opinion that the County School Board of Education reached the correct conclusion when it decided that such use of

the County school money was not legally permissible. The State Normal schools are supported by special appropriations from the State Treasury. All the children of the State must be treated alike with reference to these schools. No special privileges can be extended by any State instrumentality to any group. The Normal Schools are not county schools in any sense of the word. They are State schools, open on equal terms to all children of the State. The county school funds cannot be used for transporting children to such a school. The county school funds must be used for county school purposes within the law.

You cite no apparent authority for such a use of county school money and I am unable to find any. This Normal school does not belong to Calhoun County any more than it does to other counties of the State, and the Calhoun County Board of Education cannot, in any way, appropriate this school to its own purposes by transporting Calhoun County children to it free of charge.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 11, 1928.

State Superintendent of Education,
Montgomery, Alabama.

Dear Sir:

Making of agreements for attendance of city schools by children of county.

Opinion of Assistant Attorney General Koonce.

I have your letter of September 7, 1928, in which you state that there are approximately five hundred children in the territory immediately adjacent to the City of Birmingham for whom no accommodations have been provided by the county board of education. You also state that the same condition exists with an almost equal number of children living in the territory adjacent to the City of Bessemer. You further state that since Birmingham and Bessemer levied larger taxes for school purposes, and that since Birmingham furnishes free text books, the per capita cost in these cities is much larger than in the county schools. According to your letter the City Boards of Education of Birmingham and Bessemer made an agreement with the county board of education whereby the children mentioned above are to attend the city schools, and as a result of such agreement the City Boards of Education are to receive from the county for each pupil transferred the average per capita cost for current expenses in the cities.

You request my opinion:

1. Has a county board authority to enter into an agreement with a city board of education to pay to such city board of education for each child transferred from said county to said city, an amount equal to the average cost per pupil in the public schools of said city?

2. Has a county board of education full and complete discretion in the matter of deciding who shall be authorized to attend public schools within a city?

In my opinion a county board of education has authority to make an agreement with a city board of education whereby such city board of education shall receive from said county board of education for each child transferred an amount equal to the average cost per pupil in the public schools of said city.

In my opinion a county board of education has full and complete discretion in the matter of deciding who shall be authorized to attend public schools within a city, provided the city board of education of such city agrees to such attendance.

Section 203, School Code, 1927 (Section 166, School Code, 1924), contains the provision that the city and county boards of education shall have authority to reach agreements whereby children in the city may attend the schools in the county and whereby children in the county may attend schools in the city, and they shall do so when the school, in the city or in the county, as the case may be, is nearer to such pupils. Said Section contains the further provision that the State Superintendent of Education can make an order relative to such attendance if the county board of education and the city board of education is unable to reach an agreement.

It appears to be clear from the above provision that the city boards of education and the county boards of education have full and complete authority to make agreements whereby children of the county can attend city schools and children of the city can attend county schools and authority to decide what amount shall be paid for each child's attendance.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 12, 1928.

The Commissioner,
Department of Game & Fisheries,
CAPITOL.

Dear Sir:

Law regulating complaints in criminal cases for violations of the State Game and Fish Statute.

Opinion by Assistant Attorney General Smith.

I have your letter of October 2, 1928.

You request a construction of Section 4208, Code of Alabama, 1923, which relates to the enforcement of the State Game Law, and the filing of complaints against offenders thereunder. This Section is as follows:

"Pleadings and Practice, Rules of, under this Chapter.—Two or more offenses may be charged in the same affidavit, complaint or indictment,

and proof as to a part of a game bird or animal shall be sufficient to sustain a charge to the whole of it; and the violation as to the number of animals or birds of the same kind may be charged in the same count and punished as separate offenses as to each animal, bird or game."

I am of the opinion that Section 4208, of the Code of 1923, which relates to the State Game Law, fully covers the matter of filing of complaints against offenders. Said Section being as follows:

"* * * the violation as to the number of animals or birds of the same kind may be charged in the same count and punished as separate offenses as to each animal, bird or game."

Under the above quoted Section the Legislature has expressly provided that any number of animals, or birds of the same kind may be set out in the same count, and punished as separate offenses as to each animal, bird or game. I, therefore, advise that this statute was clearly intended to obviate the bringing of separate cases for each bird, animal or game.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 12, 1928.

The Superintendent of Education,
Evergreen, Conecuh County, Alabama.

Dear Sir:

Member of County Board of Education cannot hold office of County Health Officer.

Filling vacancy on Board of Education.

Cost of School Treasurer's Bond.

Opinion by Assistant Attorney General Rayburn.

I have your letter of September 30th, 1928.

You request my opinion:

1. Can a member of the County Board of Education legally serve as County Health Officer, filling both positions at one and the same time?
2. How is a vacancy filled on the County Board of Education?
3. Is there any provisions of law which provides for the reimbursement of a treasurer of school funds for money which he has expended in paying the premium on his bond?

In answer to your first question, it is my opinion that a person may not legally hold the office of County Health Officer and that of a member of the County Board of Education at one and the same time. This office has at various times held that a member of the County Board of Education is an officer, and holds an office of profit within the meaning of Section 280 of the Constitution, and Section 2575, Code of Alabama, 1923.

Reports of Attorney General, 1924-26, p. 234.

Reports of Attorney General, 1924-26, p. 294.

Unquestionably, a County Health Officer holds an office of profit.

Section 1059, Code of Alabama 1923, as amended Sept. 9, 1927, (General Acts, 1927, p. 778).

In answer to your second question, I advise you that a vacancy on the County Board of Education is filled by a majority of the remaining members of the County Board of Education and the appointee shall hold office for the unexpired term. If the vacancy is not filled by the remaining members of the County Board within thirty days, then the State Superintendent of Education is authorized by appointment, to fill such vacancy.

Section 88, Alabama School Code, 1927.

Where a member of the County Board of Education acquires a domicile in another State, he thereby vacates his membership on said Board.

Baker v. Conway, 214 Ala. 356, (108 So. 18).

In answer to your third question, I advise you that there is no provision of law for the reimbursement of the Treasurer of School Funds for money which he has paid as a premium on his bond.

Section 94, Alabama School Code, 1927, which has to do with the selection of the County Treasurer of school funds provides: "The County Treasurer of School funds shall serve without pay."

Section 298, Alabama School Code, 1927, provides that the County Treasurer of school funds shall give bond, etc., "and said bond shall be made in some reputable surety company authorized to do business in Alabama, and shall be made at the expense of the County Treasurer of school funds."

Opinions of Attorney General, 1927, Vol. 5, p. 293, (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 12, 1928.

Probate Judge,
Henry County,
Abbeville, Alabama.

Dear Sir:

Property owned by the State and County for public purposes is exempt from taxation in any form.

Opinion by Assistant Attorney General Smith.

I have your letter of October 10, 1928, in which you state as follows:

"The Town or City of Abbeville in this county under the municipal code has installed sanitary sewerage, a portion of which traverses a

street bordered by the county jail lot, and is endeavoring to collect from county an assessment by reason thereof."

Upon the above statement of facts you request the opinion of the Attorney General on the following question of law:

Is the County liable for the assessment made against Henry County by the city of Abbeville for installing a sanitary sewer in a street bordering on the county jail lot, which is owned and used by the county?

I am of the opinion that property owned and held by the State and counties for public purposes is generally exempt from taxation of any description, and is not deemed subject to taxation in any form, unless the intent of the Legislature to render it so clearly appears.

City of Huntsville vs. Madison County, 166 Ala. 389.

This being the law in Alabama, and there being no expression by legislative enactment making the County liable for public improvement charges, it necessarily follows that the County is not liable for said improvement charges.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 13, 1928.

The Judge of Probate,
Greensboro, Hale County, Alabama.

Dear Sir:

License to practice medicine. Applicable only to Physicians practicing in cities or towns.

Opinion by Assistant Attorney General Rayburn.

I have your letter of October 4, 1928.

You request my opinion:

Is a physician due a privilege license to practice medicine exclusively in the country, and not in incorporated towns or cities?

It is my opinion that physicians engaged in the practice of medicine outside of incorporated towns or cities are not legally subject to a privilege license.

Section 9 of an Act approved July 22, 1927, (General Acts, 1927, p. 155) reads as follows:

"Section 9. DOCTORS, MEDICAL. Each person engaged in the practice of medicine in cities or towns of over Five Thousand inhabitants shall pay an annual license of Twenty-Five Dollars (\$25.00); in cities or towns of less than Five Thousand and more than One Thousand inhabitants, Ten Dollars (\$10.00); in all other incorporated towns, Five

Dollars (\$5.00) but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which "more than one doctor is engaged, each doctor so engaged shall pay the license as above stated, provided that the license imposed by this Section shall not apply until such doctor shall have practiced his or her profession as long as two years."

You will note that said Section states that a certain license is due "in all other incorporated towns," and is silent as to other places.

The above Section was intended to replace Schedule 43 of Section 361 of the General Acts, 1919.

Opinions Attorney General, 1927, Vol. 3, p. 71 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 13, 1928.

The Judge of Probate,
Wedowee, Randolph County, Alabama.

Dear Sir:

Fines collected from parent for failure to send child to school paid into Fine and Forfeiture Fund.

Opinion by Assistant Attorney General Koonce.

I have your letter of August 17, 1928, in which you state that you imposed a fine of \$10.00 and costs on a parent for failure to send his children to school.

You request my opinion:

What disposition is made of fines which are imposed upon a parent for failure to send his children to school?

In my opinion fines which are imposed upon a parent for failure to send his children to school are to be paid into the Fine and Forfeiture Fund.

Section 4038, Code of 1923, contains the provision that all fines and forfeitures shall go to the County in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided.

Section 320, School Code of 1927, prescribes the jurisdiction of the Juvenile Court, and such Section contains the provision that all provisions of Article 1 of Chapter 100 of the Code of Alabama, 1923, which article 1 consists of Sections 3528 to 3559 both inclusive, shall apply to prosecutions or proceedings arising under the provisions of said Section 320, School Code of 1927.

I have examined the Code of Alabama of 1923, and the School Code of Alabama of 1927, and I find that neither of them expressly provide what disposition shall be made of fines and forfeitures imposed upon parents for

failure to send their children to school. Therefore, as has already been stated above, such fines should be paid into the Fine and Forfeiture Fund of the County.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 16, 1928.

The Sheriff,
Selma, Dallas County, Alabama.

Dear Sir:

Construction of statute—Section 633 of the Code of 1923, provides that the sheriff, at the expense of the county, shall furnish and place at each voting place booths.

Opinion of Assistant Attorney General Knight.

This is to acknowledge receipt of yours of recent date in which you inquire whether or not the sheriff, at the expense of the county, shall furnish and place at each voting place booths.

After careful study, I failed to find any provision of law repealing this Section of the Code. I therefore advise that the sheriff shall, at the expense of the county, provide a booth at each voting place where an election is held.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 16, 1928.

Clerk, Circuit Court,
Macon County,
Tuskegee, Alabama.

Dear Sir:

Persons employed at Government Hospital, not exempt from road duty.

Opinion by Assistant Attorney General Brassell.

I have your letter of June 15, 1928, relative to persons employed by the National Government at Tuskegee.

You request my opinion:

“Are the men employed by the National Government at the Veteran's Hospital at Tuskegee, exempt from road duty?”

In answer to your question, it is my opinion that men employed by the National Government at Tuskegee, are not exempt from working on the

public roads of Macon County, Alabama.

Section 164, p. 393, General Acts 1927, (Highway Code), provides for the exemption of certain persons from working on the public roads, and unless the persons mentioned by you, come within the purview of the herein-before cited Act, they are not exempt from working on the public roads of the County.

Opinions of Attorney General, 1927, Vol. 1, p. 349, (Office Edition).

Opinions of Attorney General, 1927, Vol. 1, p. 439, (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 16, 1928.

Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Dear Sir:

Lien on State and County for license tax.

Opinion by Assistant Attorney General Haynes.

I have your letter of September 18, 1928, in which you request my opinion as follows:

Can the State of Alabama or Tuscaloosa County enforce its lien under Section 74 of the Revenue Act of 1927, approved July 22, 1927 (General Acts, 1927, p. 186)?

It is my opinion they can. The mere issuance of a license is only evidence of the payment and where the party gives a worthless check for a license there has been no payment in contemplation of the law, and the matter stands as it originally stood. The party is doing business without a license until he has actually paid for same, and it could not be contended for one moment that the giving of a worthless check is payment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 16, 1928.

Hon. Hamp Draper,
Associate Member, Board of Administration,
CAPITOL.

Dear Sir:

Additional term of hard labor cannot be imposed in cases of public drunkenness.

Opinion by Assistant Attorney General Haynes.

I have your letter of September 26, 1928, in which you ask my opinion as follows.

Can a defendant be sentenced to an additional term at hard labor for the offense of what is commonly known as public drunkenness?

It is my opinion that he cannot. Section 3883, Code of Alabama, 1923, sets out the punishment to be imposed in cases of this character and is as follows:

"Appearing in public or at private residence while drunk or intoxicated.—Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, or at or within the curtilage of any private residence, not his own, where one or more persons are present, and manifests a drunken condition by boisterous or indecent conduct, or loud and profane discourse, must, on conviction, be fined not less than five nor more than one hundred dollars to be paid in money only."

It will be noted that the above section in referring to the punishment says:

"* * * Must on conviction, be fined not less than \$5.00 nor more than \$100.00 to be paid in money only."

It makes no provision for hard labor sentence. Therefore, such a sentence would be void as to the additional term imposed by the Court. The Court is bound by the punishment prescribed in the statute, and has no power to go beyond this.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 18, 1928.

Mr. H. T. Allen,
Election Manager,
Montevallo, Alabama.

Dear Sir:

What becomes of challenged votes—who are entitled to vote absentee ballots.

Opinion by Assistant Attorney General Haynes.

I have your letter of October 16, 1928, in which you request my opinion as follows:

1. As an election manager what shall I do with challenged votes?
2. Who is entitled to vote an absentee ballot?

Section 498, Code of Alabama, 1923, sets out the oath of a challenged

voter or elector. Section 499, Code of Alabama, 1923, sets out the oath to establish the identity of the voter or elector. Section 500, Code of Alabama, 1923, provides how the vote is disposed of in case the voter or elector fails to take oath of a challenged voter or is unable to establish his identity under Section 499, supra, and is as follows:

"Section 500. VOTE REJECTED IF VOTER REFUSES TO TAKE OATH.—If the person challenged refuses to take the oath, or if he fails to prove his identity and residence by the oath of the freeholder and householder, as above required, his vote shall be rejected and his ballot, marked with his name shall be laid aside by the inspectors."

The above status is plain in its provision. It should be laid aside by the inspector and not counted.

In answering your second inquiry, in order for a person to obtain an absentee ballot, he must first appear on the qualified list made by the Probate Judge. I am enclosing you a copy of an opinion of this office rendered on the 19th day of April, 1928, which covers all the balance of your inquiry.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 18, 1928.

State Highway Department,
Maintenance Department,
Montgomery, Alabama.

Gentlemen:

Cities cannot reduce fines for violation of Highway Law below minimum prescribed by Highway Code of 1927.

Opinion by Assistant Attorney General Koonce.

I have your letter in which you refer to Sections 48, 49, 77, 105 and 106 of the Highway Code of 1927. You state in your letter that some cities in the State contend that Section 77 does not compel them to use the minimum fines for violations of city ordinances as promulgated or as defined in said law.

You request my opinion:

Can cities and towns prescribe less than the minimum fines which are outlined in the 1927 Highway Code?

In my opinion, cities and towns cannot prescribe less than the minimum fines which are provided by the 1927 Highway Code. I have made a careful examination of all of the above sections and after said examination, it is my opinion that it was the purpose of the Legislature when it adopted the Highway Code of 1927 to provide uniform fines throughout the entire State for violations of the Highway Law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 18, 1928.

Judge of Probate.
Geneva County,
Geneva, Alabama.

Dear Sir:

Person cannot be required to pay penalty and citation fee for failure to take out automobile license, unless cited.

Opinion by Assistant Attorney General Koonce.

I have your letter of September 11, 1928, relative to transfer of automobile license tags.

You request my opinion:

If a person bought or traded for an automobile prior to October 1st, 1928, and at the time of such purchase or trade owned a tag for a car of the same horse power, but did not transfer his tag from the old car to the new one except that he took the tag off of the old car and put it on the new car, would this make such person liable for the penalty and citation fee?

In my opinion, the question which you ask must be answered in the negative. The law contemplates that citation fees and penalties shall not be collected unless the person in default is actually cited. I understand from your letter that no citation was made, but that when the person referred to made application for license for the year 1929, it came to your attention that his license tag for the year 1928 had not been transferred as provided by statute.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 18, 1928.

The Clerk of the Circuit Court,
Dothan, Houston County, Alabama.

Dear Sir:

Fees of officers and witnesses where defendant executed.

Opinion by Assistant Attorney General Rayburn.

I have your letter of July 5th, 1928. You request my opinion as to whether or not officers' fees and witnesses' fees are proper charges against the fine and forfeiture fund of a county in a case where the defendant is executed.

It is my opinion that the officers' fees and witnesses' fees are not a proper charge against the fine and forfeiture fund in a case where the defendant is executed, unless execution for costs has been issued and return made which shows "no property found."

There is no provision of law for payment of such fees when the defendant is executed. Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18th, 1927 (General Acts, 1927, p. 45), provides for the payment of officers' fees out of the fine and forfeiture fund, under certain conditions, when the return shows "no property found." Section 3763, Code of Alabama, 1923, provides that the fees of witnesses, subpoenaed on the part of the State to appear before any court in which a criminal prosecution is pending, must be taxed against the defendant, if he is convicted. This Section contemplates either that the defendant work out the sentence thus paying the costs, or the payment of said cost from the fine and forfeiture fund, when the return of execution shows "no property found".

Permit me to suggest the following legal procedure, which will hereafter make legal the payment of such fees from the fine and forfeiture fund, Section 3741, Code of Alabama, 1923, as amended September 16th, 1915 (General Acts, 1915, p. 589), provides that if a prisoner is convicted the clerk of the court in which conviction is had, shall tax the costs against the defendant and issue execution thereon, and deliver the same to the sheriff of his county. The law provides that execution shall issue within ten days from the date of conviction, and Section 3735, Code of Alabama, 1923, provides that no execution shall be returned within less than thirty days from the time it goes into the hands of the sheriff. Said Section also provides that no prisoner shall be reported as insolvent without the return of "no property" upon execution issued against him in the particular case.

Reports of Attorney General, 1920-22, p. 429.

Rarely, if ever, is defendant executed within thirty days from the date of sentence. In view of this fact, by following the Sections herein referred to, a clerk may legally collect the fees here considered from the fines and forfeiture fund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 18, 1928.

✓
Douglas L. Cannon, M. D.,
Acting State Health Officer,
Montgomery, Alabama.

Dear Sir:

Ordinances effective within police jurisdiction.

Opinion by Assistant Attorney General Rayburn.

I have your letter of October 18, 1928.

You request my opinion:

May an ordinance which regulates the slaughter, inspection, marketing, and sale of meats and meat products be legally enforced within the

police jurisdiction of any town or city within the State of Alabama wherein the same has been legally adopted?

I advise you that such an ordinance, where legally adopted, may be enforced within the police jurisdiction of any city or town in the State of Alabama.

Section 1954, Code of Alabama, 1923, provides as follows:

"1954. (1230) Police Jurisdiction territorial.—The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. **Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way belonging to the city or town.**"

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 19, 1928.

State Prison Inspector,
CAPITOL.

Dear Sir:

Prisoners—transferring from one municipal jail to another in the county.

Opinion by Assistant Attorney General Brassell.

I have your letter of August 2, 1928.

You request my opinion:

Has a State Prison Inspector the authority to order prisoners transferred from one municipal jail to another within the same county in a case where conditions are such as to justify the removal of prisoners from a municipal jail coming under his authority to the municipal jail of another city, which jail is likewise under his supervision?

In answer to your question, I am of the opinion that the State Prison Inspector is without authority to order prisoners transferred from one municipal jail to another.

Biennial Report of Attorney General 1918-20, p. 665.

The authority for the removal of prisoners on order of the State Prison Inspector is found in Section 4861 of the Code of Alabama, 1923, and that section contains all the authority touching the removal of prisoners at the instance of the State Prison Inspector.

I wish to call your attention to Section 4853 of the Code of Alabama, 1923, which is as follows:

"The only town or city prisons embraced within the provisions of this article are such as are in towns or cities of ten thousand or more population according to the last federal census."

Biennial Report of Attorney General 1918-20, p. 665.

If, however, a municipal jail in a city or town having a population of ten thousand or more according to the last federal census, should be in an unsanitary or insecure condition, the State Prison Inspector would have the authority to order the transfer of such prisoners to the county jail of that county or any other county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 19, 1928.

The State Tax Commission,
CAPITOL.

Gentlemen:

Construction of Section 81 of Alabama Highway Code—Acts 1927, pages 379-380.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of June 23rd is acknowledged. You wish my construction of Section 81 of the Highway Code of Alabama, Acts 1927, pp. 379-380. You wish my opinion:

1. The load that may be carried on a given truck on the highways of this State.
2. Is it lawful to carry on a truck on the highways of this State, a load greater than the license on such truck provides for?
3. Can a truck owner take out a license on a truck greater than the manufacturer's rated capacity of the truck and thereby lawfully carry a load greater than the rated capacity, but within such license capacity?

In answer to your first question will say that the sole purpose of said Section 81 is to prevent the carrying on any vehicle over the highways of this State a load greater than that covered by the license as shown by the tag thereon. By examination of Section 17 of the Revenue Act, 1927, it will be seen that a license for a one ton truck covers all loads of less than two tons; for a two ton truck, all loads of less than three tons; for a three ton truck, all loads of less than four tons; for a four ton truck, all loads of less than five tons; for a five ton truck, all loads of less than six tons; for a six ton truck, all loads of less than seven tons; for a seven ton truck and over any load thereon permissible on the highways, which is not over ten tons including

weight of vehicle. The part of said Section 17 relating to trucks of seven tons and over, reads as follows: "trucks of seven tons or over, one thousand (\$1,000.00) dollars."

There is a provision in said Section 17 which applies to all motor vehicles including trucks, which reads as follows:

"Provided that it shall be unlawful to operate over any of the public roads of this State any vehicle whose aggregate weight, including load, is more than ten tons, and any person violating this provision shall be guilty of a misdemeanor."

The Revenue Act, in which said Section 17 occurs, was approved July 22, 1927.—Acts, 1927, p. 187.

The Highway Code of Alabama was approved August 23, 1927.—Acts, 1927, p. 408. By subdivision (h) of Section 80 of this Act it is provided:

"No vehicle of any kind or character shall be moved upon the highways of this State whose gross weight, weight of vehicle and load, shall exceed sixteen thousand pounds per axle, etc."

The foregoing provision is not in conflict with the provision in said Section 17 of the Revenue Act, 1927, forbidding the operating "over the public roads of this State any vehicle whose aggregate weight, including load, is more than ten tons." It simply further regulates the loading of vehicles so that not more than sixteen thousand pounds of weight, load and vehicle, shall press upon the road from one axle. This conclusion is reached from two separate standpoints: First, repeals by implication are not favored, and is never allowed when a reasonable field of operation, can by any fair construction be found for each statute.—

Wyman vs. Campbell, 6 Port. 219;
Kinney vs. Mallory, 3 Ala. 626;
Iverson vs. State, 52 Ala. 170;
Smith vs. Speed, 50 Ala., 276;
Enloe vs. Reeke, 56 Ala. 500;
Parker vs. Jayne, 14 Ala. 727;
Rawl vs. Kennedy, 23 Ala. 240, 249;
Pearce vs. Banks, 33 Ala. 693.

Second. Section 227 of said Highway Code provides:

"That all laws and parts of laws in conflict with this act shall be and the same are hereby repealed; provided that the provisions of this act shall not repeal the public statutes of this State pertaining to the raising of revenue to be used or intended for use in the construction, repair and maintenance of public roads, highways and bridges."

Section 17 of Revenue Act, 1927, is a public statute of this State "pertaining to the raising of revenues to be used or intended for use in the construction, repair and maintenance of public roads, highways and bridges."

In the latter part of said Section 17, we find the following:

"The money collected as motor truck license taxes by the State less expenses, shall be used exclusively to create a sinking fund for the prompt and faithful payment of principal and interest on good road bonds and for construction, maintenance and improvement of public highways, roads and bridges as required under provisions of Article XX of the Constitution of Alabama."

It thus appears that the provision in said Section 17 is not only not repealed by implication by the enactment of Section 80 of the Highway Code, but is specifically preserved from repeal in any respect by the enactment of the Highway Code, by the provision above quoted from Section 227 of the Highway Code.

It, therefore, follows that trucks of less than one ton with a license according to manufacturer's rating, may carry any load of less than a ton; trucks of one ton, with a license according to manufacturer's rating, may carry any load of less than two tons; and so on to trucks of seven tons and over with a license according to manufacturer's rating may carry any load to where truck and load together weigh not more than ten tons. Where weight of load and vehicle is over ten tons, such is prohibited from traveling on the public road. In no case must there be greater pressure on the road from one axle than sixteen thousand pounds.

When a load is carried on a truck greater than above stated, the Act falls under the condemnation of said Section 81 of the Highway Code.

The foregoing also answers your second question.

In answer to your third question will say that, in my opinion, a person may, if he desires to carry on a truck a load greater than that allowed under license based on manufacturer's rated capacity, take out a license therefor large enough to cover the load to be carried on his truck, provided truck and load shall not exceed ten tons in weight—such loads being prohibited under any license. Section 81 of Highway Code reads, in part, as follows:

"It shall be unlawful and constitute a misdemeanor for any person to drive or operate any vehicle upon the roads or highways of this State, unless the tag license attached to the vehicle is of the proper classification computed upon the basis of the load carried upon the vehicle as provided by law, etc.,"

While a person may not use upon a motor vehicle in this State a license tag smaller than required by the manufacturer's rated capacity, he may use a license tag greater than that required for the manufacturer's rated capacity. This legislative intent is shown by the provision in Section 12 of Act No. 290, Acts, 1923, p. 286. This provision is as follows:

"Person paying an automobile license may have the same transferred * * * to any other car provided the same is not of a greater horse power."

The foregoing clearly authorizes the use of a license tag on a motor vehicle of less horse power than that provided by the license, but not on a motor vehicle of greater horse power. The foregoing applies to automobiles

and motor cars kept for private use. It is provided, however, in said Section 17 that—

“Any owner of a motor truck who has already obtained a license or license tag as provided by law and who exchanges for another may obtain a transferred license tag or certificate in the same manner and upon the same terms and conditions upon payment of the same fee as do owners of automobiles when obtaining a transferred license or license tag.”

In the case of automobiles kept for private use the license is measured by horse power and the license tag may be transferred, in the manner provided by statute, to another automobile kept for private use of equal or less horse power. It was evidently the legislative intent, in the part of Section 17 last above quoted, to give a corresponding privilege to the owner of a truck. Since the license for a truck is measured, not by horse power, but by tonnage, a corresponding privilege would be to allow the license tag on a truck to be transferred to another truck of equal or less tonnage, in the manner provided for the transfer in case of automobiles kept for private use. The Legislature here recognizes the practice of using on a truck a license tag greater than the manufacturer's rated capacity.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 23, 1928.

County Treasurer,
Mobile County,
Mobile, Alabama.

Dear Sir:

Power of Board of Revenue or Commissioners Court to appropriate money for farm work.

Opinion by Assistant Attorney General Haynes.

I have your letter of September 6, 1928, in which you request my opinion on the following matter:

Can the Board of Revenue of Mobile County appropriate \$1,000.00 to be used by the Chamber of Commerce for the extermination of insects on satsuma trees and the promotion of the same?

It has long been settled in this State that whatever powers the Courts of County Commissioners or Boards of Revenue has is derived from legislative enactment. The Court is purely a creature of statute and has no inherent or constitutional powers.

Edwards vs. Williamson, 70 Ala. 145, 117 Ala. 203 (23 So. 807).

Therefore, it follows before this appropriation can be made the Board of Revenue of your County must be able to point to some direct statute author-

izing it. I am of the opinion, however, in this particular case you have the power. Subsection 23 of Section 6755, Code of Alabama, 1923, which Section sets out the authority of the Court of County Commissioners of the various counties, is as follows:

"23. To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

You will note in the above we have the expression: "developing agriculture." Certainly anything which might prevent destruction of any farm product would amount to its development. Therefore, I am of the opinion that the above is sufficient authority for this appropriation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 24, 1928.

Hon. T. J. Shirley,
Warden, Kilby Prison,
Montgomery, Alabama.

Dear Sir:

Construction of Section 138 of Constitution of State of Alabama.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of October 20th, 1928, is acknowledged. You make inquiry as follows:

1. If a sheriff serves approximately half his term and dies, could his predecessor succeed him by appointment and serve the remaining part of his term?
2. If so, would such person then be eligible to election for the following term of office?

The answer to your questions depends upon what is the proper construction of Section 138 of the Constitution of the State of Alabama as applied to the facts stated by your questions. This section of the Constitution reads as follows:

"A sheriff shall be elected in each County by the qualified electors thereof, who shall hold office for a term of four years, unless sooner removed, and shall be ineligible to such office as his own successor."

It is my opinion that a person who is duly elected sheriff for a term of four years is ineligible to hold such office during the succeeding term of four years—he is ineligible to hold such office during any part of the succeeding term. Any person holding such office during any part of the succeeding term

of four years is, in contemplation of said Section 138, a successor to such sheriff.

To make a person ineligible to hold the office of sheriff under the provision of said Section 138, as his own successor, he must have been elected for the term of four years. This does not apply to one who has been appointed to fill out an unexpired term. If eligible to fill out the unexpired term by appointment, he is also eligible to election for the next succeeding term of four years.

Black vs. Pate, 130 Ala. 514.

But when one is elected to a four year term and holds office for such term, he is ineligible to hold such office during any part of the succeeding term.

The opinion to you of October 23rd, is hereby overruled and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

 

October 24, 1928.

The Judge of Probate,
Wetumpka, Elmore County, Alabama.

Dear Sir:

Absentee Ballot—Expenses incident thereto.

Opinion by Assistant Attorney General Rayburn.

I have your letter of October 12, 1928.

You request my opinion:

What provision is made for expenses incurred by the Probate Judge in sending absentee ballots to be used in the approaching general election?

In answer to your inquiry will say that the only expense provided for under the law are, first, payment for preparation of official ballot; and second, postage stamps used in sending said ballot to the voters who have requested same.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 24, 1928.

Hon. G. C. Phillips, Chairman,
Dallas County Democratic Executive Committee,
Selma, Dallas County, Alabama.

Dear Sir:

Construction of statute—ballots in General Election must be numbered.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your inquiry of October 23, 1928. You inquire whether or not each ballot cast in a general election must be numbered.

Section 444 of the Code of Alabama, 1923, specifically provides that each ballot shall be numbered by one of the inspectors to correspond to the number of the voter voting the same, on the poll list. The statute further provides that the number corresponding with the voter's name on the poll list **must be plainly entered in ink on the back of the ballot of the voter.**

An inquiry identical to yours has heretofore been propounded to this office regarding Primary elections. It is true that Sections 627 and 628, Code of Alabama, 1923, which refer to Primary elections are in apparent conflict. This office has heretofore rendered an opinion that the ballots even in a Primary election must be numbered.

Biennial Report of Attorney General 1924-1926, p. 363.

There is no conflict, however, in the general election law on the subject and the provisions of Section 444 as to numbering the ballots, should be complied with.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 25, 1928.

Hon. J. F. Posey,
Judge of Probate,
Prattville, Autauga, County, Alabama.

Dear Judge:

Proper charge by Judge of Probate for issuing license "A" private automobile tag.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of October 24th is acknowledged. In reply will say that you are acting according to law in collecting only \$11.75 for an "A" private automobile tag. If any of the Judges of Probate are collecting \$12.00 for such tags, they are, in my opinion, collecting twenty-five cents illegally.

The price of the tag mentioned as provided by Section 12 of House Bill 321, approved Sept. 13, 1923, is \$11.25 and by Section 363 of the Revenue

Act of 1919, the Judge of Probate is allowed to collect from the applicant fifty cents for issuing the license, which makes \$11.75 in all. I find no other legitimate charge that may be added by the Judge of Probate for issuing such a license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 26, 1928.

Hon. R. E. Tidwell,
State Superintendent of Education,
CAPITOL.

Dear Sir:

When children may be taken on bus owned and operated by County Board of Education from rural district to City of Jacksonville to attend State Normal School.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of October 25th is acknowledged. You ask an opinion upon the following statement of facts:

"The County Board of Education of Calhoun County operates a bus to transport school children from the rural school districts to the Jacksonville City School. The bus can carry, without additional expense, to the City of Jacksonville, children who wish to attend the State Normal School at that place. You wish to know if it is permissible to let such children ride on the bus free of charge?

In reply will say that in my opinion such course is permissible where no additional cost to the county school fund is imposed and the members of the County Board of Education and the driver of the bus are willing.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 26, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Court Reporter—fee for reporting condemnation proceeding of automobile for transportation of prohibited liquor.

Opinion by Assistant Attorney General Rayburn.

I have your letter of Oct. 26, 1928. You request my opinion:

Is a reporter entitled to a fee of five dollars for each day or fractional part of a day for his services in reporting a condemnation proceeding of an automobile which was engaged in the transportation of prohibited liquor?

I advise you that I find no provision of law which authorizes such a payment.

Section 6738, Code of Alabama, 1923, provides that:

"In all cases reported by the official court reporter or special reporter, there shall be taxed as part of the cost of the case a fee of five dollars for each day or fractional part thereof that such reporter shall be engaged in reporting a case, to be collected as costs as in other cases, and, when collected, paid by the clerk of the court into the county treasury of the county in which the case is tried."

Section 6739, Code of Alabama, 1923, as amended Sept. 2, 1927 (General Acts 1927, p. 599), provides for the payment of the salary of official court reporters. Under said Section an official court reporter is paid by the several counties each month, in a method and manner specified by said Act.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 30, 1928.

The Clerk,
Circuit Court of Houston County,
Dothan, Houston County, Alabama.

Dear Sir:

Costs in cases where a change of venue is had.

Opinion by Assistant Attorney General Haynes.

I have your letter of October 27, 1928, in which you state as follows:

That Charles Campbell was indicted for murder in the Circuit Court of Houston County. He was given a change of venue to the Circuit Court of Geneva County.

On this statement of facts you request the opinion of the Attorney General on the following questions:

1. Should the Clerk of the Circuit Court of Houston County or the Circuit Clerk of Geneva County approve the witness fees for witnesses before the grand jury?
2. Should the Clerk of the Circuit Court of Houston County or the Clerk of the Circuit Court of Geneva County approve the witness fees of witnesses before the Circuit Court held in Houston County?

3. Should the Clerk of the Circuit Court of Houston County or the Clerk of the Circuit Court of Geneva County approve the witness fees before the Circuit Court of Geneva County?

4. Should the Clerks of the Circuit Court and the Sheriffs of Houston and Geneva Counties make separate claims on the fine and forfeitures fund of Houston County for their respective fees in this case, and should these claims all be approved by the Probate Judge of Houston County?

Under Section 5587 of the Code of 1923, all the fine and forfeitures in such cases go to the County in which the indictment was found and judgment must be rendered accordingly, and all fees of jurors and witnesses, on being certified by the Clerk of the Circuit Court of the county to which the trial is removed are a charge on the County in which the indictment was found, and like manner as if the trial had not been removed. This of course could have reference only to the cost of witnesses and other costs that accrue after the case was removed, in this particular instance, to Geneva County. Therefore in answering your first inquiry I am of the opinion that it would be your duty as Clerk of the Circuit Court of Houston County to certify the witnesses that were before the grand jury, as this county is the county where the indictment was returned.

In answering your second inquiry, I am of the opinion that it would be your duty to certify all witnesses which appeared before the Circuit Court of Houston County before this case was removed.

In answer to your third inquiry I am of the opinion that it is the duty of the Circuit Clerk of Geneva County to certify all witnesses that attended court in that county after the case was removed.

In answer to your fourth inquiry, I am of the opinion that the Clerks and Sheriffs of the two counties should make separate claims on the fine and forfeiture fund of Houston County for their respective fees in this case. All claims for witness fees and other costs which go against the fine and forfeiture fund of Houston County should be approved by the Probate Judge of Houston County.

It is my opinion that you should procure from the Circuit Court of Geneva County a full and complete transcript of the judgment rendered in this case and record the same in Houston County, in your office. This would give you authority to act where the law provides for you to act.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 31, 1928.

Hon. A. W. Hawke,
City Clerk,
Atmore, Escambia County, Alabama,

Dear Sir:

Decennial Federal census governs the term of office in towns with more than two thousand population.

Opinion by Assistant Attorney General Haynes.

I have your letter of September 27, 1928. You request my opinion on the following matter:

The town of Atmore, Alabama, in 1920 had only 1,775 inhabitants. In December 1927 we had a representative from the census bureau at Washington to come here and take the city census and at that time we had 3,074 inhabitants. The question which confronts us now is: Does a special census we had taken in 1927 make it legal for the officers who were elected September 17th of this year eligible to hold office for four years under the recent Act of the Legislature?

In my opinion it does not make it legal for the officers of the town of Atmore elected September 17, 1928, to hold office for a term of four years until the first Monday in October 1932. The Act of the Legislature of 1927 which was approved September 19, 1927, (General Acts, 1927 p. 706) provides among other things the following:

"* * * * Provided, however, that cities of two thousand population and over, according to the next preceding decennial federal census, shall elect their mayor, and councilmen, and other officers authorized by law to be elected on the third Monday in September, 1928, and quadrennially, thereafter; * * *."

You will observe the above is based on the decennial federal census and no other and the word decennial means ten. Therefore, the population of the town must be based on the regular federal census which is taken or is supposed to be taken every ten years and could not be based on a special taking of the census even though it be approved by the federal census board.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

October 31, 1928.

Hon. Wm. T. Seibels, Solicitor,
Fifteenth Judicial Circuit,
Montgomery, Alabama.

Dear Sir:

The taking of orders for hosiery to be later delivered by mail or express is interstate commerce, and is not a subject of license taxation by either State or municipality.

Opinion by Assistant Attorney General Brassell.

I have your letter of October 4, 1928, requesting that I advise you concerning the question of license of a person taking orders for hosiery.

You request my opinion:

Is an agent selling hosiery by sample taking orders to be later delivered by mail or express, or otherwise by a foreign company repre-

sented by an agent liable for license, and if so what license? Would such agent be liable for State as well as municipal license in which he so conducts such business?

In answer to your question I am of the opinion that where an agent takes orders and exhibits samples of hosiery in this State which are to be delivered by mail or express from another State is a subject of interstate commerce, and is, therefore, not subject to license tax by either the State or municipality.

McCarter vs. City of Florence, 213 Ala. 367.

Opinions of Attorney General, Book 2, p. 267, (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 2, 1928.

Chief Examiner of Accounts,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Order of Commissioners Court for superintending and inspecting public work.

Opinion of Assistant Attorney General Haynes.

This is to acknowledge receipt of your letter of recent date in which you state that the members of the Commissioners Court of Lee County, acting under a general order of October 12, 1920, which authorizes them to have supervision over public roads and bridges of their district, have collected, large sums of money for per diem and for expenses for this work, and are now acting under this order.

The only authority which would purport to authorize the individual commissioners taking per diem and expenses for the supervision of the roads in their district is to be found in extract from the minutes of the Commissioners Court of October 12, 1920, which is as follows:

"The County special road law of 1915 for Lee County, Alabama, having been repealed thus putting into operation the General Road Law of the State of Alabama it was ordered by the Court the Engineer of Lee County be dismissed and the road crews looked after by the Commissioner in the district in which they are working."

In view of the foregoing statement of facts you inquire whether or not the order was sufficient to authorize the inspection of roads and bridges by the individual commissioner in his district; whether it is necessary that at each meeting of the Commissioners Court a resolution must be spread upon the minutes specifically authorizing the inspection of the road required or needed; whether or not each commissioner is personally liable for monies

collected pursuant to the hereinbefore mentioned order of the Commissioners Court; whether or not the Probate Judge is liable upon his official bond for issuing warrants if the expenditure is illegal?

Answering your first and second questions I am of the opinion that the order of the Commissioners Court referred to does not furnish authority for the inspection at the expense of the County, by the commissioners. It is well to note that this order was made in 1920, over eight years ago.

Your attention is invited to Section 6771, Code of 1923, which provides, among other things, that no allowance should be made to anyone for per diem or mileage for inspecting roads, bridges, etc., except when acting under the authority of an order of the Commissioners Court previously made. Obviously this provision of the law contemplates an order of the Commissioners Court authorizing the specific work at a specific time.

The commissioner who receives this money illegally is liable therefor, and the officer who issues a warrant for the same is also liable. Section 321, Code of 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 2, 1928.

The Sheriff,
Mobile County,
Mobile, Alabama.

Dear Sir:

Delivery of prisoners by officer of incorporated town to Sheriff of County.

Opinion of Assistant Attorney General Haynes.

I have your letter of October 31, 1928, in which you state:

That the Town of Citronelle is an incorporated Town in the County of Mobile. The Mayor of Citronelle sitting as a committing magistrate tries criminals binding them over to the Circuit Court of your County, issues mittimus and sends them to you at Mobile.

You desire to know if you have authority to pay the officer delivering these prisoners for same.

I am unable to find any law or statute that requires you to pay for the delivery of a prisoner who has had a preliminary trial outside the City of Mobile and sent to you by a committing magistrate. Before a charge can be made for any fee the officer claiming same must be able to point to some statute authorizing it. See Section 3734, Code of Alabama, 1923. 109 Ala. 162.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 8, 1928.

The Circuit Solicitor,
Mobile County,
Mobile, Alabama.

Dear Sir:

Only one solicitor's fee in bastardy cases.

Opinion of Assistant Attorney General Haynes.

I have your letter of November 5, 1928, in which you request my opinion on the following matter:

Where a party is convicted in the Circuit Court on a charge of bastardy which must as a matter of course have originated in the justice court, can there be charged up against the defendant one or two solicitor's fees?

It is my opinion only one solicitor's fee can be charged, and that for services rendered in the Circuit Court. The preliminary investigation provided for by Sections 3416, 3417 and 3418 of the Code is made by the Justice of Peace and no service by a solicitor is provided for until the case reaches the Circuit Court. The fee provided for in Section 3738 of the Code is for conviction and no conviction can be had in the Justice Court, but in the Circuit Court only.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 8, 1928.

The Clerk of the Circuit Court,
Anniston, Calhoun County, Alabama.

Dear Sir:

Circuit clerk required to prepare record where appeal taken even though no bill of exceptions filed.

Opinion by Assistant Attorney General Rayburn.

I have your letter of October 23, 1928.

You request my opinion:

In a criminal case where an appeal has been taken and a certificate of appeal has been filed in the Appellate Court by the Clerk of the Circuit Court, and the appellant does not file a bill of exceptions in the case, and makes no demand from the Circuit clerk for a transcript of the record in the case, is the clerk of the circuit court required to prepare and forward to the reviewing court a transcript of the record or will the case be dismissed on the certificate only?

I advise you that a clerk, in cases such as you outline, should prepare a transcript of the record.

Section 3248, Code of Alabama, 1923, reads as follows:

"3248. TRANSCRIPT ON APPEAL; WHEN MADE OUT AND FORWARDED.—When the execution of the judgment has been suspended as provided in this article, or when an appeal is taken without suspension, it is the duty of the Clerk of the Court in which the case was tried to make out a full and accurate transcript of the record, attach his certificate thereto, and transmit it to the clerk of the Supreme Court within twenty days thereafter; or within twenty days after the signing of the bill of exceptions; or if the bill is not signed and filed, such transcript must be made out and forwarded within twenty days after the expiration of the time allowed by law for the signing of the bill of exceptions."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 8, 1928.

Dr. W. A. Black,
County Health Officer,
Fort Payne, Alabama.

Dear Sir:

County Health Officer is the man designated under the statute to pass on the disability of a person who makes application under such disability for peddling license.

Opinion by Assistant Attorney General Haynes.

I have your letter of October 16, 1928, in which you state that you are County Health Officer, and that it becomes your duty as County Health Officer to pass upon the disability of persons who make application for a license to peddle based on such disability and on account of this responsibility at times it might place you in an embarrassing position.

You desire to know if there is not some way around it for you.

I am unable to find any other method prescribed by statute for passing on these matters. The plain provisions of Section 80, Acts 1919, page 425 approved September 15, 1919, places this duty on the county health officer. In accepting this office he accepts the burdens as well as the emoluments of same, and I know of no way for you to avoid this duty as long as you remain in this position.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 8, 1928.

Hon. J. C. B. Gwin,
Judge, Tenth Judicial Circuit,
Bessemer, Alabama.

Dear Sir:

Boxing exhibition under auspices of American Legion Post.
Opinion by Assistant Attorney General Rayburn.

I have your letter of October 24, 1928.

You request my opinion:

Has Worth Lewis Post No. 22, a local unit of the American Legion situated at Bessemer, Alabama, a legal right to sponsor, promote, or conduct boxing exhibitions within the City of Birmingham, Alabama, under the laws of Alabama?

In answer to the foregoing inquiry, it is my opinion the Worth Lewis Post of Bessemer, Alabama, may legally promote, sponsor or conduct boxing exhibitions within the City of Birmingham, Alabama, or any other city within the State of Alabama.

An Act approved July 1, 1927 (General Acts, 1927, p. 92, etc.), authorizes the Alabama Athletic Commission to issue a license or permit to any patriotic organization which is chartered by authority of a special act of the Congress of the United States or local unit thereof, for the purpose of conducting a boxing, sparring or wrestling match or exhibition. Said Act provides that such exhibitions shall be under the supervision of and subject to the rules and regulations of the Alabama Athletic Commission. After a careful reading of the rules and regulations of the Alabama Athletic Commission, revised Sept. 5, 1927, I find no inhibition against a Post of the American Legion staging or promoting a boxing exhibition in some city other than the home of said Post.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 9, 1928.

Hon. John L. Scogin,
Sheriff and Returning Officer,
Montgomery, Montgomery County, Alabama.

Dear Sir:

The original certificate by the managers of elections in any precinct in Alabama must be deposited in a box and sealed up and copy furnished Judge of Probate.

Opinion by Assistant Attorney General Haynes.

I have your letter of November 9, 1928, in which you request my opinion on the following matter:

I note that you state that there was an election held on November 6, 1928, throughout the State and in Montgomery County; that the certificate in two or three instances of the election which is required to be made by the managers of the election and delivered to the Returning Officer and by him to the Probate Judge, is missing, and you desire to know if you are authorized to open the Box and get the original certificate from the Box and proceed to canvass the returns.

It is my opinion and I so hold that you do not make your canvass from the certificate of the election from the various precincts of Montgomery County which was delivered to the Probate Judge by the Returning Officer, but that you must open each box, go into the box, procure the original certificate, of which the one to the Probate Judge is only a copy, and from this certificate, make your canvass. Section 456 Code of Alabama, 1923, says: That a copy of this certificate shall be made by the Inspectors, sealed in an envelope and delivered to the Returning Officer of the Precinct and by him in turn be delivered to the Probate Judge; that on canvassing day, when the Board meets to make what is known as final count, and if in any Beat the original certificate is lost, mutilated or absent, then the canvass may be made from the one delivered by the Returning Officer to the Probate Judge.

Of course, the original will be found in the Box of the Beat from which it came, and there is no other way of procuring it, except by opening the Box, and certainly under Section 456, supra, the Inspectors fail to enclose it, or it is so mutilated that it cannot be intelligently deciphered, then it would be your duty to procure the one from the Judge of Probate, and with this proceed to make the canvass.

Section 456, which I have quoted from, is very clear and hardly needs any construction. It is almost self explanatory.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 10, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
Montgomery, Ala.

Dear Sir:

Minimum fine for carrying concealed pistol. Section 3485 of Code.

Opinion by Assistant Attorney General Haynes.

Receipt of your letter of July 31, 1928 enclosing letter to you written by W. L. Malcomb is acknowledged.

You wish to know the minimum fine allowed by law on conviction under Section 3485 of the Code for carrying concealed weapons:

Section 3485 of the Code of Alabama, 1923, reads as follows:

3485. CARRYING CONCEALED WEAPONS.—Any person who carries concealed about his person a bowie knife, or knife or instrument of like kind or description, or a pistol or firearm of any other kind, or an airgun must on conviction be fined not less than fifty, nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months. The defendant may give evidence that, at the time of carrying the weapon, he had good reason to apprehend an attack, which the jury may consider in mitigation of the punishment, or justification of the offense."

The minimum fine fixed by the statute is fifty dollars, except where the defendant gives evidence that, at the time of carrying the weapon concealed, he had good reason to apprehend an attack. In such case the jury may, if it sees fit assess a fine of less than fifty dollars, or may acquit the defendant if they think that under the facts of the case defendant was fully justified in carrying a concealed weapon.

Bass v. State, 63 Ala. 59.

Maxwell v. State, 39 So. 382.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 21, 1928.

The State Auditor,
CAPITOL.

Dear Sir:

Section 9569 and 9573 Code. Separate bond given for each term of office by Probate Judge.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of November 20th is acknowledged. You state that M. D. Wiggins was elected Judge of Probate of Morgan County for the term beginning the first Monday after the second Tuesday in January, 1929. He has presented for filing a bond covering a period of six years and two months beginning November 14, 1928. You wish to know if this bond is made for a period of time provided by law.

In reply will say that a separate bond must be executed for each term or part of term of office. Before a person is required or allowed to file bond as an officer he must first be appointed or elected as provided by law for the term for which bond is tendered; and two terms, nor part of two terms, can be included in the same bond. No bond can be filed for a term or part of a term for which he has not been chosen as required by law.

In my opinion the bond tendered should not be accepted as it fails to comply with the law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 21, 1928.

The Superintendent,
Bureau of Insurance,
CAPITOL.

Dear Sir:

Foreign Title Insurance Company—when authorized to transact business within the State of Alabama.

Opinion by Assistant Attorney General Rayburn.

I have your letter of November 21, 1928, in which you request a construction of Section 8516, Code of Alabama, 1923. You request my opinion upon the following statement of facts:

In the event that a foreign title insurance company satisfies the Superintendent of Insurance that said company is legally organized under the laws of the State of New York to do the business it proposes to transact, and has deposited with the proper officer of said State Securities to the actual cash value of \$100,000.00 consisting of United States bonds, state bonds or municipal bonds, where the total bond issue of such municipality does not exceed five per cent of the taxable value of the property stated therein or notes secured by mortgages on real estate for double the amount and securities, you, as Superintendent of Insurance, approve the same, and said company files with you a certificate from the proper official of the State of New York with whom said securities are deposited, stating the name and amount of said securities, and you are satisfied that said securities are worth at least \$100,000.00, and that said deposit of said securities is made with the proper official of the State of New York by said title insurance company, has such company fully complied with Section 8516, Code of Alabama, 1923?

In answer to your inquiry, it is my opinion that when a foreign title insurance company satisfies you that it has protected its policy holders and prospective policy holders in the method and manner outlined by you, then said title insurance company has fully complied with Section 8516, Code of Alabama, 1923.

The requirements of said section, as regards the depositing of \$100,000.00 of securities may be complied with by depositing the same with the proper officer of some state other than the home state of said company. That is to say, the place of making said deposit is optional.

In order that you may readily understand the amount of securities which, under the laws of Alabama, must be deposited in the State of Alabama by a foreign title insurance company, before said company may legally transact business in Alabama, I advise you that Section 7093, Code of Alabama, 1923, is the sole criterion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 22, 1928.

Hon. Jno. G. Sargent,
Attorney General,
Washington, D. C.

Dear Sir:

On sales of motor fuels to United States, by dealers in Alabama, no tax exacted. Where such tax has been paid in past, Alabama has no law by which refund can be made.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of November 9th is acknowledged. You ask if any administrative procedure has been established by the State authorities exempting from tax, motor vehicle fuels sold to the United States by dealers who are accountable to the State for the tax, the date when the procedure became effective, and whether claims for the refundment of taxes heretofore erroneously collected will be allowed if properly supported by evidence of payment, and what should be made in such claims.

In reply will say that after decision by the Supreme Court of the United States in the case of Panhandle Oil Company vs. State of Mississippi, all such dealers in this state made objection to further payment of such tax on sales made by them to the United States. Thereupon, the State Tax Commission of Alabama asked the opinion of this office as to whether such dealers were liable under the Alabama law on sales to the United States. This office gave the opinion that there was no tax intended under the Alabama law on such sale. As I am informed, by the State Tax Commission, no such tax has been collected or requested since the decision in the Panhandle case.

While the State of Alabama has some statutes providing for refunding certain taxes erroneously paid, in my opinion, none of such statutes apply in case of the tax in question. If refund is made, the Legislature will have to make provision for such refund.

Yours truly,
CHARLIE C. McCAIL,
Attorney General.

November 22, 1928.

The State Auditor,
CAPITOL.

Dear Sir:

Construction of Section 9573 of Code.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of November 20th, 1928 is acknowledged.

You wish to know if it is permissible for a Judge of Probate, elect, to divide the amount of bond, fixed by the Auditor as provided in Section 9573

of the Code, into two or more separate bonds or should the whole amount be in one bond.

In reply will say that in my opinion only one bond is contemplated by the statute and that it is not permissible to make any bond for less than the amount named by the Auditor.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 22, 1928.

The State Superintendent of Banks,
CAPITOL.

Dear Sir:

Constitutional Law: Statute may not be construed as authorizing the investment of trust funds by guardian of minor in stock in Building and Loan Association.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of October 30th, 1928, in which you request an opinion of this office as to the constitutionality of an Act of the Legislature approved August 26, 1927.

The Act in question authorizes minors to invest in Building and Loan Association stock and to contract in connection with such investment.

Should a minor have funds **under his control** he may, by virtue of the above referred to act, invest the same in such associations.

However this Act may not be construed as authority for the investment, by a guardian of trust funds belonging to a minor, in such stock. Such an investment by a guardian is illegal and the Legislature is powerless to authorize it in view of the constitutional inhibition.

Section 74, Constitution of 1901.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 24, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Construction of statute. Local Act of 1915, approved September 14th, 1915, (Local Acts 1915, p. 374) applicable to Jefferson County. Authorizes the premium on the bonds of county officers who are required by law to give bond to be charged against the county.

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your request for an opinion of date November 20th, 1928. You inquire whether or not that certain Local Act of 1915, applicable to Jefferson County, approved September 14, 1915, (Local Acts 1915, p. 374) authorizes the premiums on the bonds of the chief clerk, and other assistants to the officers mentioned in the Act, or Section 3 thereof, shall be a charge against the county.

I am of the opinion that the premiums on the bonds of the chief clerks and assistant to officers, including the deputy sheriff of Jefferson County, are not a charge against the county, unless such officers are required by law to give bond. If the bonds are required of such clerks and assistants purely to indemnify their chief, and not county or State, there is no authority of law for the payment of the premium by the county.

I also find authority by a General Act, viz: 2658 of the Code of 1923, for the charge against the county of the premium on the bond of a county officer who is required by law to give bond.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 24, 1928.

The Judge of Probate,
Butler, Choctaw County, Alabama.

Dear Sir:

Chauffeur's License—Chauffeur defined.

Opinion by Assistant Attorney General Brassell.

I have your letter of November 21, 1928.

You request my opinion:

First. Do men employed to operate motor trucks hauling lumber, have to secure chauffeur's license?

Second. What is a chauffeur?

In answer to your first question, I am of the opinion that any person employed to operate a motor vehicle on a public highway, must secure a chauffeur's license.

General Acts of Alabama, 1927, p. 285, Section 9, is as follows:

"Chauffeur. An operator who directly or indirectly receives compensation for operating a motor vehicle on the public highways."

Opinions of Attorney General, Book 2, p. 5, (Office Edition).

In answer to your second question, a "chauffeur" may be defined as one who operates an automobile.

"It is the business of one who operates an automobile along the public highways. It is such a business attendant with such, and requires a degree of scientific knowledge upon which others must rely, that the Legislature may properly impose conditions on its exercise."

Words and Phrases, Vol. 1, p. 656, (n.s.)

Christy v. Elliott, 74 N. E. 1035-1040, 216 Ill. 31.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 24, 1928.

Hon. E. W. Patton, D. D. S., Secretary-Treasurer,
Board of Dental Examiners of Alabama,
725-726 First National Bank Building,
Birmingham, Jefferson County, Alabama.

Dear Sir:

License to practice Dentistry—Authority of Board of Dental Examiners.

Opinion by Assistant Attorney General Rayburn.

I have your letter of November 20, 1928. You state that a certain dentist from Wisconsin moved into Alabama in October, 1927, and on the 13th of said month, said dentist was granted a temporary license to practice dentistry which was to remain in force until the next regular licensing meeting of the Board of Dental Examiners in June of 1928. By an Act Approved September 6th, 1927, (General Acts 1927, p. 747), the Legislature of Alabama repealed the provision of the law relative to the issuing of a temporary license but the Secretary-Treasurer acted, in issuing such temporary license, on the assumption that said amended Act did not become a law until the expiration of sixty days.

You further state that the Board of Dental Examiners refused to issue to said applicant from Wisconsin license at the regular licensing meeting which was held in June of this year, on the ground that very damaging evidence was brought to the attention of the Board of Dental Examiners, which brought into question the applicant's professional character. Said applicant did not stand examination, but for the information received by said Board relative to applicant's professional character, he would have been granted a license under reciprocity.

You request my opinion:

1. Was the Secretary-Treasurer of the Board of Dental Examiners of Alabama operating within the law in issuing the temporary permit hereinabove referred to?

2. Has the Board of Dental Examiners judiciary powers, in the exercise of which, applicant may be refused a license for cause under Sections

328 and 329, Code of Alabama, 1923, as amended September 6, 1927?

3. Is it necessary that the applicant be informed of the specific reasons or causes of the action of the Board of Dental Examiners of Alabama in refusing to issue a license?

4. Is there any provision of law which would force the Board of Dental Examiners to give applicant a hearing before withholding a license from him?

In answer to your first question, I advise you that Section 330, Code of Alabama, 1923, pertaining to the issuance of a temporary certificate was repealed by an Act approved September 6, 1927, (General Acts, 1927, p. 747 to 753 inclusive), you, therefore, were in error in issuing a temporary certificate after September 6, 1927, as the repeal of said certificate was effectuated on that date. Doubtless you had in mind a provision of the law relative to the effectiveness of criminal statutes. Criminal statutes go into effect sixty days after the date of enactment, unless the Act provides otherwise. But the section here considered is civil, not criminal.

In answer to your second question it is my opinion that the Act hereinabove referred to, which was approved September 6, 1927, clothes the Board of Dental Examiners with the right to say who shall practice the dental profession in the State of Alabama. I find no provision of the law which requires said Board to give their reason for refusing a license to practice dentistry to any applicant.

In answer to your third question, I advise you that, under the statutes pertaining to the practice of dentistry, such information is not required to be given.

In answer to your fourth question, I advise you that it is the policy of the law that every person, before having judgment passed upon his legal rights, be given an opportunity to appear before the body or authority having such matter under advisement, and that he or she be permitted to offer evidence in his or her behalf. It is likewise the policy of the law, that such persons, so interested, may be represented by counsel if desired, and that such a person has the right to be confronted by the witnesses who testify against him, or that he be permitted to see a copy of whatever affidavit or pleading which may have been filed with said Board or body.

The Board of Dental Examiners may, for cause which they deem sufficient, refuse to issue a license to an applicant, but said Board cannot legally refuse to permit an applicant to stand an examination for the purpose of securing a license to practice dentistry. If an applicant feels that his legal rights have been violated, in that the Board of Dental Examiners has refused to perform a positive duty which the law enjoins them to perform, the courts of the State are open to him for the issuance of a writ of mandamus or other appropriate remedy.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 28, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Construction of Section 375 and 376, of Act No. 328, approved Sept. 15, 1919, (Acts 1919, p. 445).

Opinion by Assistant Attorney General Evans.

Receipt of your letter of November 2, 1928, is acknowledged. You ask the following question:

A person makes application to the Judge of Probate in person or by letter for a license to do a particular act or business for which a license is required. Upon payment of the amount required by law for such license, the judge of probate issues the license. After obtaining the license such person decides not to engage in such business or do such act. You wish to know if such person is entitled to a refund under the provisions of Sections 375 and 376 of the Revenue Act 1919, (Acts 1919, p. 445).

In reply will say that a person is entitled to a refund under said Sections only when through a mistake or error on the part of the judge of probate he has paid to the judge of probate money that was not due from him for such license. In the case mentioned by you there was no mistake or error on the part of the judge of probate. The person was entitled to purchase the license and the judge of probate could not legally have refused to issue it on payment of the amount. It was no concern to the judge of probate whether he used the license or not.

In such a case, there is no provision of law for a refund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Copy to
The State Auditor,
CAPITOL.

November 28, 1928.

The Judge of Probate,
Marion, Perry County, Alabama.

Dear Sir:

What constitutes a motorcycle within the meaning of Section 12 of Act 290, approved Sept. 13, 1923, (General Acts 1923, pp. 285, 286).

Opinion by Assistant Attorney General Evans.

Receipt of your letter of July 24th is acknowledged. You state the following:

An ordinary bicycle to which is attached a motor which pushes or pulls the bicycle—is this combination a “motorcycle” within the meaning of Section 12 of Act No. 290, approved Sept. 13, 1923, (General Acts, 1923, pp. 285, 286).

In reply will say that Section 4 of said Act defines what is meant in said Act by the word “motorcycles.” It is thus defined:

“Every motor vehicle designed to travel on not more than three wheels in contact with the ground and not exceeding ten horse power and not exceeding the weight of five hundred pounds unloaded.”

While Section 2 of said Act defines what is meant by the word “motor vehicle.” It is thus defined:

“Every vehicle, as herein defined, which is self-propelled.”

In my opinion, an ordinary bicycle, designed to be propelled by something not constituting a part of its mechanism, is not a motorcycle within the meaning of said Section 12. To be a motorcycle within the meaning of said Section 12 of said Act, it must be a motor vehicle; and to be a motor vehicle, it must be self-propelled. To be a “motor vehicle” within the meaning of said Act, the motor power must constitute an integral part of the vehicle.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 3, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Board of Revenue of Jefferson County should deduct cost of assessment and collection of tax before payment to City of Birmingham, under Section 6774, Code of Alabama, 1923.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 24, 1928, in which you state that under Section 6774, Code of Alabama, 1923, the Board of Revenue of Jefferson County has paid the City of Birmingham one half of the gross amount of the proceeds collected under a special tax levy for road purposes on property in the City of Birmingham. No allowance or deduction was made for the cost of collection, which amounts to two per cent as fees of the Tax Assessor and Tax Collector for their services.

Upon this statement of facts you request my opinion on the following question:

Whether the Board of Revenue of Jefferson County is authorized to deduct the cost of collection and then remit one half of the net amount,

or should said Board of Revenue pay one half of the gross collections?

Section 6774, Code of Alabama, 1923, is as follows:

"6774. ONE-HALF ROAD TAX COLLECTED IN MUNICIPALITIES TO BE PAID TO CITY. The Courts of County commissioners and Boards of revenue, where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads and highways of any description in the county except the special tax authorized by sub-division (a) of Section 215 of the constitution, shall pay over each year to each municipality therein one-half of the money collected on such road tax on the property located in such municipality."

I am of the opinion that under the above quoted section of the Code, it is the duty of the board of revenue of Jefferson County to deduct the expense of the assessment and collection of said tax from the gross amount collected, then pay to the City of Birmingham one half of the net balance.

This policy of the State has obtained since the 59th Alabama, where it is said by the Court, in speaking with reference to poll taxes which had been levied exclusively for the school system:

"It was not contemplated that it should be relieved of the common burden of all revenue raised under our statutes—the expense of its own assessment and collection."

Shaver v. Robinson, 59 Ala. 195;

State v. Jefferson County, et al. 86 So. 88-89.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 4, 1928.

The Commissioner,
Department of Game & Fisheries,
CAPITOL.

* Lease of Oyster Bottoms.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of November 13, 1928. You state that in conformity with an Act approved February 25, 1915, (General Acts 1915, p. 145), the Secretary of State of Alabama, leased to certain parties, in Mobile County, Alabama, water bottoms for oyster purposes. You enclosed one of said leases which was made by the State of Alabama to Arthur Zeirlott of Mobile County.

You direct my attention to Section 7 of an Act approved October 1, 1923, (General Acts 1923, p. 672), which reads as follows:

"Sec. 7. That from and after the passage of this Act the leasing of the State's public oyster bottoms by persons, firms and corporations shall not be permitted, and all laws now in force relating to the leasing of said bottoms be and the same are hereby repealed; provided that all present lease-holders may continue to remove commercial oysters from their leased bottoms until May 1, 1928, and provided further that said leaseholder or lease holders shall pay to the Commissioner of Game and Fisheries, or his duly authorized agent, the sum of \$1.00 per acre per annum during the time which he is permitted to operate his leased bottoms."

You further state that there is not now a lessee who has complied with the provisions of the Act approved February 25, 1915.

You request my opinion:

1. Has the State, through its Legislature, the power to repeal said leases?

2. Has the Commissioner of Game and Fisheries the authority to declare void, and of no force said leases upon a failure by the lessees to comply with any or all of the terms of said lease?

In answer to your first inquiry, it is my opinion that Section 7, *supra*, is unconstitutional, being repugnant to Section 22 of the Constitution of Alabama insofar as it applies to existing contracts made under authority of General Acts 1915, p. 145. Said Section of Said Act seeks to nullify a contract which was entered into by the State of Alabama without legal justification, which is tantamount to impairing the obligations of a contract.

Under the law, contracts which are made by the Legislature, or authorized by the legislature, cannot be impaired any more than contracts which are made by individuals.

Slaughter v. Mobile, 73 Ala. 134.

The mere fact that the State is a party to a contract does not authorize the legislature to impair its obligation.

State v. Cobb, 64 Ala. 127.

In answer to your second question, I advise you that where the lessee fails to comply with any of the terms of the lease entered into by virtue of the Act approved February 25, 1915, (General Acts 1915, p. 145), said lease thereby becomes null and void, and the Commissioner of Game and Fisheries is authorized to so treat said lease. That is to say, the several things which the lessee is to perform, which are enumerated in said Act, are conditions precedent which must be complied with before said lease becomes operative, and of binding force and effect upon the lessor, the State of Alabama. The laws of contracts pertaining to contracts entered into by a sovereign state are fundamentally the same as those dealing with contracts entered into by and between individuals.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 5, 1928.

Judge of Probate,
Talladega, Talladega County, Ala.

Highways—County must procure the right of way for roads, which includes damages to crops on right of way.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 1, 1928. I note from your letter that the State Highway Department is constructing a road or Highway from Aniston to Pell City in this State, and this highway passes through the northern end of Talladega County. That it becomes the duty of the County of Talladega through its Commissioners Court or Board of Revenue, to procure the right of way for this road in your county before construction shall begin.

You desire to know whether it is the duty, under the law, for the County of Talladega to pay whatever damages may arise by the destruction of the crops growing on this right of way, or whether it is the duty of the State through its Highway Commission to take care of this item.

Article 1 of Section 31 of an Act approved August 23, 1927, (General Acts, 1927, p. 348), provides that the right of way deemed necessary by the State Highway Commission for the construction of roads and bridges by the Highway Commission shall be procured by the county through which the road passes or the bridges built, and is as follows:

"RIGHT OF WAY FOR ROADS; How acquired. The right of way deemed necessary by the State Highway Department for a road or bridge constructed under the provisions of this article shall be acquired by the county in which such road is to be located, without expense to the State. Should the county fail or refuse to acquire the necessary right of way, the State through the State Highway Department shall have authority at the expense of the county to acquire such right of way, either by purchase or by the exercise of the right of eminent domain in condemnation proceedings, as is provided for under the laws of this State." It is my opinion that where the above statute says:

"* * * shall be acquired by the county in which such road is located, without expense to the State. Should the county fail or refuse to acquire the necessary right of way, the State through the State Highway Department shall have authority at the expense of the county to acquire the same * * *."

carries with it all that is required to be done in order to procure the right of way including damages. If there is a house or barn on the highway or any other structure on the right of way, the county shall, of course, take care of this, as a part of the damage or expense in procuring the right of way.

I note that you say in your request that it has been the practice of the State Highway Commission in constructing roads to remove these impediments. The reason for this is clear, as the removal of these obstructions

would naturally constitute or be a part of the construction itself, and what is true as to houses, barns, etc., would be equally true as to crops growing on the highway.

It is my opinion that the County must turn the right of way over to the State Highway Commission unencumbered, and in order to do this they would have to take care of the crops, if there be any, which are found on the highway at the time of construction.

See opinion of Attorney General, November 5, 1927.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 5, 1928.

The County Treasurer,
Jefferson County,
Birmingham, Ala.

Fees of Coroner when acting as sheriff. Fees, as used in Section 3751, Code of Alabama, 1923, referring to the fees received by coroner in exercising duties of sheriff, construed to mean compensation received by the sheriff.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of October 24, 1928, in which you inquire as to what compensation the coroner should receive when performing the duties of a sheriff. Mentioning the fact that sheriff Hartsfield died during his term of office, and his successor has not yet been appointed.

I am of the opinion that the coroner, while performing the duties of sheriff, should receive the same compensation the sheriff received for similar service. In the instant case the coroner should receive the same salary that the sheriff received. I am not unmindful of the fact that the Supreme Court in that recent case of *Hartsfield v. Henry*, (in mns.) and *Birmingham Electric Co. v. Harry*, 111 So. p. 142, held that fees could not be construed to mean the same as salary within the meaning of Section 96 of the Constitution, and Section 281 of the Constitution. However, in the instant case it is necessary to construe the intention of the legislature.

There are no local provisions regulating the compensation a coroner shall receive for his services while performing the duties of a sheriff. Therefore, the general statute on the subject, viz; 3751, must prevail. Construing the word "fees" as used in Section 3751 of the Code, we must give due consideration to the fact that the sheriff of Jefferson County receives no fees, and the word must be construed in the light of the legislative intent. In my opinion, the legislature did not intend that the coroner of Jefferson County take the office of coroner cum onere, and that he receive no compensation for his

services while performing the duties of sheriff. Neither do I construe the above referred to Section of the Code to provide that the coroner should receive fees for acting as sheriff of Jefferson County when the law provides that the sheriff of Jefferson County shall receive no fee.

Consequently, I am of the opinion that under the circumstances, in light of the General Act on the subject, and the Local Act appertaining to the compensation of the sheriff of Jefferson County, the word "fees" as used in this section of the Code must be construed to mean compensation, and that the coroner of Jefferson County, while performing the duty of the sheriff, should receive the same compensation as the sheriff. That is, he should receive the same salary that the sheriff received.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 7, 1928.

The Judge of Probate,
Evergreen, Conecuh County, Alabama.

Release of property from mortgage by mortgagee to mortgagor not a conveyance of property or interest in property within the meaning of Section 22½ of Act No 163, Acts 1927, p. 163, approved July 22nd, 1927.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of November 30th, is acknowledged. You wish my opinion as to whether or not a release of property from a mortgage by a mortgagee to a mortgagor for a consideration and the execution by such mortgagee to such mortgagor of a quit claim deed to such property constitutes a conveyance of property upon which a deed filing tax is due under Section 22½ of Act No. 163, approved July 22nd, 1927, (Acts 1927, p. 163).

In reply will say that in the case of Garrison, Judge of Probate v. Hamlin 215 Ala. 39, it was held that the mortgagee's interest in the property mortgaged was not property, or interest in property, within the meaning of Section 1 of Act. No. 301, approved September 14, 1923, (Acts 1923, p. 318), known as the deed filing tax law of 1923. So far as what is meant by property or interest in property is concerned, said Section 22½, which now constitutes the deed filing tax law, is the same as it was in the Act construed in the Garrison v. Hamlin case. If the interest held by the mortgagee in the property conveyed is not property or interest in property within the meaning of said section, then it necessarily follows that the mortgagee in conveying back to the mortgagor the title to part of the property which he holds as mortgagee, does not convey property, or any interest in property, within the meaning of said section.

From the foregoing, it necessarily follows that no deed filing tax is due upon the filing of such instrument for record.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 7, 1928.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Justices of the Peace not county officers. Counties not liable for premium on justices of the peace bonds.

Opinion by Judge Smith, Assistant Attorney General.

Dear Sir:

I have your letter of December 6, 1928, in which you request the opinion of the Attorney General on the following question of law:

Does Section 2658, Code of Alabama, 1923, which provides that all county officers shall furnish bond with a surety company, and that the premium thereon shall be a charge against the county, include Justices of the Peace and Notaries Public ex-Officio Justices of the Peace?

I am of the opinion that a Justice of the Peace is not a county officer within the meaning of the statute requiring all county officers to furnish bond, and making the premium thereon a charge against the county. The words "county officers" as used in the above referred to statute, means an officer who is elected solely by the voters of the county, or one who has the power to exercise the functions of his office throughout the entire county.

Reynolds v. Tarrant County, 78 Texas 289.

A justice of the peace is a precinct officer.

35 Corpus Juris 450

Meyer v. Culver;

35 Pacific Reporter 984

State v. Vineyard;

72 Pacific Reporter 824.

A justice of the peace is a judicial officer, he is at the same time a precinct officer.

31 Pacific Reporter 864.

Having reached the conclusion that a justice of the peace is not a county officer as used in the statute requiring counties to pay premium on bonds of county officers, I therefore overrule a decision of the former Attorney General rendered December 3, 1926, and hereby withdraw an opinion rendered by me on March 14, 1927, and this opinion is substituted in lieu of the two opinions heretofore referred to.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1928.

The Tax Collector,
Anniston, Calhoun County, Alabama.

Dear Sir:

The exemption provided for by Act No. 73, approved Feb. 18, 1927, applies to taxes assessed on the property to which exemption applies.

Opinion by Assistant Attorney General Evans.

Your letter of October 1, 1928, is acknowledged. You wish to know if, under the provisions of Section 3023 of the Code, where exemptions have been provided by the Board of Revenue of the County such taxes should be assessed by the tax assessor and the exemption to apply to the taxes assessed.

In reply will say that Section 3020 and Section 3024 of the Code were never operative or valid; but Act No. 73, approved Feb. 18, 1927, (Acts 1927, p. 55) et seq., provide a similar remission. By the terms of the Act the Board of Revenue is empowered "to remit the taxes assessed." This necessarily means that the taxes should be assessed and the remission by the Court of County Commissioners acts upon the taxes assessed. This remission by the Court of County Commissioners should be noted by the tax collector upon his stub and upon the receipt of the tax payer.

It will be well to keep in mind that this remission does not apply to the three mill county school tax nor to the three mill district school tax. These taxes must be collected and accounted for to the proper authorities.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 11, 1928.

The Judge of Probate,
Monroeville, Monroe County, Ala.

Dear Sir:

License Fee: Attorneys must pay both license provided by Section 6230 of Code of 1923, and the license provided by Section 7 of an Act approved July 22nd, 1927 (General Acts 1927, p. 154).

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of October 22, 1928.

You inquire of this office what license fees attorneys are required to pay.

Section 6230 of the Code of Alabama of 1923 provides that attorneys must pay a license fee of Ten Dollars, Five Dollars of which becomes a part of the general fund of the State treasury and the other Five Dollars

is to be held by the treasurer as a special fund to be paid out exclusively upon the order of the Board of Commissioners of the State Bar.

Section 7 of an Act approved July 22, 1927, (General Acts 1927, p. 154) provides that attorneys shall pay a license fee of Fifteen Dollars. This fee becomes a part of the general funds of the State over which the Board of Commissioners of the State Bar has no control. This Act specifically provides that the Fifteen Dollar license fee shall be **in addition to the fee** provided by Section 6230 of the Code of 1923.

It is, therefore, obvious that an attorney must pay both fees.

Opinion of Attorney General to Judge of Probate, Russellville, Ala., Oct. 27, 1927.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Enc.

December 12, 1928.

The Judge of Probate,

LaFayette, Chambers County, Alabama.

Constitutional Law. Construction and regulation of State Highway Department.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of October 1, 1928, in which you inquire as to the validity of that certain **regulation** of the State Highway Department as follows:

"No person or persons shall haul upon a public highway after a **rainfall of sufficient duration to warrant damage to the roadway by such hauling**, until **such time has elapsed** to allow the road to dry sufficiently so that the resumption of hauling will not damage the surface of the roadway. Any person or persons violating this provision shall be guilty of a misdemeanor and upon conviction shall be punished as provided by law."

I am of the opinion that the above quoted regulation is void and of no force or effect, for uncertainty and indefiniteness.

Under Section 19 of the Act approved Aug. 23, 1927, known as "The Alabama Highway Code," the Highway Department has power to make reasonable and necessary rules and regulations to prevent injury to any of the public roads and by Section 182 of said Act, the violation of said rules and regulations is made a misdemeanor but the foregoing regulation abounds in uncertain and indefinite terms in its attempt to prohibit hauling over a road after a rainfall. The uncertainty of the regulation is clearly demonstrated by the use of words, in describing the elements of the acts it

attempts to prohibit, which depend upon the opinion or judgment of others than those clothed with the authority to prescribe the regulations. Hence any attempt to enforce the regulation would be legislation on the part of the courts.

The court may not allow a conjectural interpretation to usurp the place of judicial exposition.

Standard Oil Co. vs. State, 59 So. 667, 178 Ala. 400.

There must be a competent and efficient expression of the legislative will.

State vs. Partlow 91 N. C. 550.

Being unable to ascertain the will of those clothed with the authority to pass regulations on such matters, inscrutable in essential part, and being denied the legislative function, this office has no recourse but to declare the regulation void and of no effect.

Authorities supra

State vs. Board of Revenue, Mobile County, 180 Ala. 514.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 13, 1928.

The Adjutant General,
State Capitol,
Montgomery, Alabama.

Governor Commander-in-Chief of military and naval forces of this State. May order National Guard into active service to attend President's Inauguration at Washington. Expenses paid under Section 74 of Act of Legislature, 1927, page 596.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 30, 1928, in which you request the opinion of the Attorney General on the following questions of law:

First. Can the Governor legally order troops of the Alabama National Guard out to participate in the President's inauguration in Washington, D. C., on March 4, 1929?

Second. Can the expenses therefor be paid out of the general fund of the State, or can the expenses be paid out of the military funds available under Section 1559 and 1581 of the Code of Alabama?

In answer to your first question I advise that Section 1558 of the Code of Alabama, 1923, constitutes the Governor Commander-in-Chief of all the

military and naval forces of the State, except when they shall be called into service of the United States. The next Section 1559 of the Code defines the powers of the Governor, as Commander-in-Chief which is in part as follows: "The Governor may authorize all or any part of the National Guard to participate in any parade, review, or other public exercise, or to serve for escort duty, and such expenses incidental thereto as he may authorize may be paid as hereafter provided for **active service**." I am, therefore, of the opinion that the Governor may legally order any part of the National Guard into active service to participate in the President's inauguration in Washington, D. C., on March 4, 1929.

In answer to your second question I am of the opinion that the expenses incident to carrying out the orders of the Governor made pursuant to the authority given him under Section 1558 of the Code of Alabama, 1923, should be paid as provided for troops in **active service**, as provided for in Section 1584 of the Code of Alabama, 1923, which is as follows:

"When troops are in active service.—The troops ordered into the service of the State for the enforcement of the law, the preservation of the peace, or for the security of the rights or lives of citizens, or protection of property, shall be deemed to be in active service. Officers and enlisted men employed under orders of the governor in recruiting, making tours of instruction, inspection of troops, armories, storehouses, camp sites, rifle ranges and military property, sitting on general or regimental courts-martial, boards of examination, courts of inquiry of boards of officers or making and assisting in physical examinations shall be deemed to be in active service when it is so specified in orders. Orders shall specify in every case if pay and travel expenses are allowed."

It is well to note that the orders of the Governor should specify if pay and travel or expenses are allowed.

After consideration of the foregoing provisions of the Code I am of the opinion that the expenses above referred to should be paid for under Section 74 of an Act of the Legislature, 1927, To regulate and provide for the support and upkeep of the militia and naval forces of the State of Alabama, page 596, which is as follows:

"Special Appropriations for Active Military Service.—In addition to the monies appropriated in section 73, there is appropriated out of the monies not otherwise appropriated, such sum as may be necessary for pay, subsistence, shelter, travel, and other necessary expenses of troops called into the active military service of the State for the purpose of enforcing the law, preservation of peace, for the security of lives of citizens, for relief and aid in case of disaster, for the protection of property, or other service ordered by the Commander-in-Chief. The disbursement of all funds appropriated by this act shall be with the approval of the Governor."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 13, 1928.

The State Tax Commission,
CAPITOL.

Dear Sirs:

Where a person voluntarily purchases an automobile license, through no error or mistake on the part of the Judge of Probate, and the money is paid into the State Treasury, there is no provision of law for refunding such money.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of September 4th is acknowledged. You request my opinion upon the following:

A person expecting to purchase a certain car, obtains from the Judge of Probate a license for such car. He does not, however, for some reason, buy the car and applies to the Judge of Probate to have the money paid for the license refunded. You ask if such money can be legally refunded.

In reply will say as follows: Section 72 of the Constitution of Alabama provides that "no money shall be paid out of the treasury except upon appropriation made by law and warrant drawn by the proper officer in pursuance thereof." It, therefore, follows that the money in question cannot be paid out of the State Treasury unless there is some provision of law for doing so. The case stated by you does not fall under the provisions of Sections 375 and 376 of the Revenue Act, 1919. The money was not paid, so far as the statement made goes, through error or mistake on the part of the Judge of Probate. I know of no provision of law under which the money so paid into the Treasury can be paid out. I therefore, give it as my opinion that money paid into the Treasury, under the facts stated by you, cannot be refunded.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 14, 1928.

Hon. John Brandon,
Secretary of State,
CAPITOL.

Where Secretary of State required to attest an instrument in writing in his official capacity it is proper to affix the Seal of the State to his attestation as evidence of the genuineness of the attestation.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of this date is acknowledged. You wish my opinion upon the following:

Act No. 292, approved August 31, 1927, Acts 1927, page 278, authorizes incorporation by the Alabama Highway Director, the President of the State Board of Administration of Alabama, and the Chairman of the State Tax Commission of Alabama, for the purpose of constructing, or causing to be constructed bridges, etc. The corporation so formed is empowered, among other powers, to borrow money from time to time in such amounts as it may deem best, and as the Governor may approve, and to execute therefor notes or bonds of the corporation, signed by the three members thereof, and attested by the Secretary of State, and to secure said notes or bonds and mortgages, to pledge the bridges and the tolls collected from said bridges for such time as may seem proper to said corporation, with the approval of the Governor. The Act gives the corporation the right to have a corporate seal.

You wish to have my opinion, whether or not, you, as Secretary of State, in attesting such bond or notes, should affix to your attestation the great Seal of the State of Alabama.

In reply will say that it is customary, as I understand the practice, for the Secretary of State to affix the great Seal of Alabama to his attestations, as Secretary of State, to show the genuineness of the attestation. Such being the case it will be presumed that when a statute of the State of Alabama requires attestation by the Secretary of State it is intended that he affix to his signature of attestation the great Seal of the State of Alabama as indicating the genuineness of the attestation. The purpose and meaning of the attestation must be gathered from the provisions of the Act. The affixing of the Seal under such circumstances adds no liability to the State nor to the Secretary of State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 14, 1928.

The Clerk of the Circuit Court,
Florence, Lauderdale County, Alabama.

Dear Sir:

Fines and forfeitures for violations of Alabama Highway Code.

Clerk not due five per cent commission for remitting same.

Opinion by Assistant Attorney General Rayburn.

I have your letter of October 23, 1928.

You request my opinion:

1. Is it the duty of the Clerk of the Circuit Court to send all fines in both the circuit and county courts for the offenses of driving a car while the driver is intoxicated, reckless driving, driving a car without a license, etc., to the State Treasurer?

2. Is the Clerk of the Circuit Court entitled to five per cent commission for remitting certain fines?

In answer to your first inquiry, I advise you that it is your duty to send all fines which are collected for the offense of driving a car while the driver thereof is intoxicated and reckless driving, as well as other violations of Article II of the Alabama Highway Code to the State Treasurer within thirty days after the collection of the same, as provided by Section 106 of said Act approved August 23, 1927, (General Acts, 1927, p. 391). However, driving a car without a license is a violation of the Revenue law, and the fine collected upon a conviction therefor is not forwarded to the State Treasurer.

In answer to the second question, I advise you that the Clerk is not entitled to five per cent commission for remitting said fines to the State Treasurer. The laws of costs and fees are strictly construed. No fees are allowed except in cases expressly provided by law.

Section 3734, Code of Alabama, 1923.

Troup v. Morgan Co., 19 So. p. 503.

Dent and McGruder vs. State, 42 Ala. 574.

Sections 3324 and 3328, Code of Alabama, 1927, were repealed by an Act designated as the Alabama Highway Code, which was approved August 23, 1927. Section 230 of the Act approved August 23, 1927, (General Acts, 1927, p. 408) provides that said Act shall, "except as may otherwise be provided for, certain articles contained therein, go into effect by the passage and approval of the Governor."

Section 48 of said Act declares the driver of a vehicle while the driver is intoxicated to be a misdemeanor, and Section 49 of said Act makes the reckless driving of a vehicle upon the highway a misdemeanor; both sections fixed the punishment for said offenses. As no exception is made with reference to the time that said sections become effective, they went into full force and effect on August 23, 1927. That is to say, that for such offenses committed prior to August 23, 1927, you should dispose of the fines and forfeitures for the particular violations named by you in conformity with sections 3324 and 3328, Code of Alabama, 1923. On and after August 23, 1927, you should dispose of the fines and forfeitures so collected in conformity with the Act approved on said date and known and designated as the "Alabama Highway Code," found at pages 348 to 408, General Acts of Alabama, 1927.

Where a prosecution was instituted under Section 3324 and 3328, Code of Alabama, 1923, and a conviction is had at any time subsequent to August 23, 1927, the provisions of Section 106 of the Act approved August 23, 1927, (General Acts, 1927, p. 390) do not apply thereto. That is to say, said Act is not retroactive.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 14, 1928.

The County Solicitor,
Camden, Wilcox County, Alabama.

Dear Sir:

When sentence in misdemeanor case can be suspended.

Opinion by Assistant Attorney General Haynes.

I have your letter of September 3, 1928, in which you request my opinion on the following matter:

Has the judge the authority to suspend a sentence of additional hard labor or imprisonment in the county jail?

Under Section 5284, Code of Alabama, 1923, the court is given the authority to suspend sentence. This has reference only to additional punishment imposed, whether to hard labor for the county or in jail. He can only do this, however, to the subsequent term of court, and may at that time order its execution or remit the same. This Section is as follows:

"Section 5284. Punishment by imprisonment in county jail or at hard labor for county, sentence for suspended or remitted.—When the court imposes additional punishment where a fine has been assessed by a jury, or in any case where the court is authorized to impose such punishment at imprisonment in the county jail or at hard labor for the county, the court may, in its discretion, suspend the execution of such sentence until a subsequent term of the court and may then order it to be executed or remit the same, or further suspend the execution of the sentence."

I think the above statute is quite clear, and you will have no trouble in understanding it.

See also Vinson vs. The State, 16 App. Court, 536.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 14, 1928.

The Superintendent of Education,
Clayton, Barbour County, Alabama.

Dear Sir:

Construction of statute. Necessity of notice to be given of the holding of a special district three mill school tax election.

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your letter of October 27th, 1928, in which you state that notice of holding an election to determine whether

or not a district three mill tax should be levied was not posted in the district. You state that the publisher of a county paper was instructed to withdraw the notice. You also ask if the notices are not posted, within ten days of the election, and the notice runs for two issues of the paper previous to the election, and the majority of the voters vote favorable on the proposed tax election, and the election is legal in every other particular, would the election be legal and valid?

I am of the opinion that under the circumstances set out in your letter viz: That the notice was not posted in three places within the school district thirty days prior to the date set for the said election, that the election would not authorize the levying of the tax, and any levy made pursuant to such election would be null and void.

Section 263 of the School Code of 1927, provides that notice must be given for at least thirty days prior to said election.

In the case of special elections there must be a substantial compliance with the statutory mode of publishing the notice, and it has been held in such cases that where the notice of the election shall be both published in the newspapers, and posted in the form of handbills, both must be done or the election will be invalid although the electors may have actual notice of the election:

20 Corpus Juris, p. 100.

I am not inclined to interfere with the district school tax election on any narrow or technical ground, but the will of the Legislature must be made effective. The language of the Section of the School Code, above quoted, is exclusive, emphatic and mandatory. Notice must have been given as provided by the statute for at least thirty days. It follows obviously that the election in question would establish no result since there was a lack of compliance with the mandatory provision of the statute as to notice.

Shanks vs. Winkler, 210 Ala. 101.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 15, 1928.

The Director,
State Highway Department,
CAPITOL.

Dear Sir:

Bonus—payment of to regular employees of the State.

Opinion by The Attorney General.

I have your letter of December 14, 1928. In it you state that the Highway Department, in its convict operations, in order to stimulate activity in its various camps put a bonus system into effect. You state that,

under this system, the camp moving the most yardage of dirt at the lowest cost was to have added to the salary of each member of said camp a bonus for having accomplished additional work, etc., at less cost. You further state that the Chief Examiner, Department of Examiners of Accounts, has declined to approve pay rolls of such employees of your Department where a bonus has thus been added to an employee's salary.

You request my opinion:

Has the State Highway Department the legal right to carry such a system into effect when approved by the Governor?

In your letter you do not state sufficient facts, but from it, I judge that the conditions are as follows: The State Highway Department employs a large number of civilians at the various road camps throughout the State. The Department, also, by statute, employs convict labor from the State Board of Administration at not exceeding the statutory rate prescribed for such labor. A portion of the civilian employees at the road camps are engaged in supervising the work of the convicts turned over to the particular road camp to perform the manual labor of moving dirt, etc. You entered into a verbal contract of employment with each of the civilian employees at the road camps at a definite salary per month for each of said civilian employees. Later, you found that the work of said employees was not in all respects at each camp as good as you desired it to be, and so, following said verbal agreement of employment with said civilians, your department in order to stimulate greater continued activity on the part of said civilian employees, notified them in each camp that, of all camps in the State, the one which, during a definite period, moved the most yardage of dirt at the lowest cost, should have added to the salary of each civilian employee of that camp, a definite additional sum in the way of a bonus, over and above the regular monthly salary or compensation of each of the particular employees thereof. I assume, of course, that in your arrangement, you contemplated no bonus for convict labor, since the maximum per diem for convict labor is provided by statute.

Such being the case, I am of the opinion that the arrangement suggested by you cannot legally be carried into force and effect, for the reason that it would be contrary to public policy, and therefore, in my opinion, the Chief Examiner of Accounts was legally justified in refusing to approve the payment of bonuses attached to the salaries of such regular civilian employees.

It is not necessary here for me to consider the question as to whether or not payment of the bonuses under such circumstances would be unlawful as violative of Section 68 of the Constitution.

In engaging the services of persons as public officers, clerks, assistants and servants generally, the State, by its contract of employment and stipulation of compensation is entitled to expect of the employee, the full and faithful performance of all duties imposed upon him by statute or by contract. It is a general rule of law that:

"A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. Therefore, as a general rule, the performance of, or promise to perform an existing legal obligation is not a valid consideration."

It is also stated as a principle of law:

"Where a party is under a duty created or imposed by law to do what he does or promises to do, his act or promise is clearly of no value and is not a sufficient consideration for a promise given in return. Thus, since a public officer is at law required to perform his duties for his salary or other stated compensation, a promise to pay him more than this is founded on no consideration, for he is simply promising in return to do, or is actually doing, what he is bound to do."

13 Corpus Juris, p. 351.

The rule may be stated in another way:

"From an early day, it has been established and continues to be the rule that an agreement to pay money to a sheriff or other public officer for doing what he ought to do is void and against public policy."

34 Cyc. p. 1753.

Illustrations in regard to rules ordinarily refer to public officers, but, in my judgment, the rule applies with equal force to the state's employees generally. In actual practice, over an officer of the State there hangs a possibility of impeachment for neglect of duty or unfaithful discharge of trust, while over the ordinary employee in the State's various and sundry activities, there is the possibility of being discharged where the employee fails to give the State what it may reasonably expect for the compensation granted or agreed upon.

It is not within the province of the Attorney General in matters which do not concern his Department, to deal with questions of administrative policy, and I desire to make it clear that, in holding agreements contrary to public policy, I am distinguishing between the two propositions.

For the reasons stated under the facts as I understand them, I am of the opinion that the Chief Examiner, Department of Examiners of Accounts, was correct in refusing to approve the accounts in the manner in which they were prepared.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 17, 1928.

Alabama Highway Director,
Montgomery, Alabama.

Highway Commission: Authority to change number of trunk road.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of recent date.

You inquire whether or not the State Highway Commission has authority to number state trunk roads different from the numbers given such roads by statute, viz: by Section 1391 of the Code, 1923.

I am of the opinion that the State Highway Commission may give trunk roads such numbers as it sees fit.

Considering the section hereinbefore referred to, Section 1391 of the Code of 1923, in light of the provisions of statute regulating and defining the authority of the State Highway Commission, viz: Sections 6, 16, 19, 36, 43, 44 of the Alabama Highway Code of 1927, Act approved August 23, 1927, (General Acts, 1927, p. 348), I am influenced to the conclusion that the numbers given trunk roads by Section 1391 of the Code of 1923 are merely descriptive and used purely for the convenience of the law-making body.

The general authority given the Highway Commission by the adoption of the Highway Code of 1927 clearly embraces the right to number roads as it may deem proper.

It appears that Section 1394 of the Code of 1923, which provides specifically that the Highway Commission may change the number of roads, is a conclusive indication of the correctness of the opinion herein expressed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Dec. 18, 1928.

Deputy Solicitor,
Wilcox County,
Camden, Ala.

Ownership of Lost Property.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 17, 1928, in which you state that your sheriff has in possession an automobile which was abandoned in your county sometime ago. The owner being undetermined, the sheriff is of the opinion that there is some statute in Alabama providing for its sale.

I am unable to find such a statute, and my opinion is that such a matter, in the absence of a statute, would be governed by the general rule of the Common Law, which is as follows:

"By the general rule of the Common Law one who finds and apprehends a lost chattel not buried or attached to the soil acquires title thereto and the right of possession against the whole world except the true owner."

19 Cyt. 535;
1 Stewart v. Planters Bank 320;
18 Am. Dec. 48.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Dec. 18, 1928.

Hon. William J. Foster,
County Solicitor,
Tuscaloosa, Tuscaloosa County, Ala.

Dear Sir:

Construction of Schedule 70, Revenue Act, 1919, Acts 1919, p. 419 et seq.

Opinion by Assistant Attorney General Evans.

Your letter of May 17 received. You wish my construction of Schedule 70 of Section 361, Revenue Act, 1919, first, as to what is meant therein by "principal business," and second—Can a person operate more than one loan business in the same county under the same license?

In reply to your first question, will say that we construe the words "principal business" as used in said schedule to mean that the lending is not made as a mere incident to and in furtherance of some other business, but is made for the profit to be derived from the loan.

It does not mean the biggest business the person is engaged in; but an independent business run for the profit therein, whether the biggest or otherwise.

Opinion Attorney General Aug. 24, 1928 to Judge of Probate, Butler County.

Also Opinion Attorney General May 5, 1927, to Judge of Probate, Franklin County.

In answer to your second question, will say that a money lender who has taken out a license in one county in the State may lend money anywhere in the State without taking other license, provided, he does not maintain an office at more than one place. If he maintains an office in more than one county, he must pay a license in each county where an

office is maintained. A license should be issued to the person in his real name, and a license issued to a fictitious name is no license at all and authorizes no one to do business.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 18, 1928.

Hon. T. V. White,
Clerk of the Board of Revenue,
Livingston, Sumter County, Alabama.

Dear Sir:

Board of Revenue: Authority to make appropriations to pay for cost of making survey or plat.

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your letter of recent date in which you inquire whether or not the Board of Revenue of Sumter County has authority to make an appropriation to pay a portion of the cost of making a survey or plat in the Town of York, Alabama. You state that it will aid the Board of Revenue in the levying of taxes on town lots.

I am of the opinion that the Board of Revenue has authority to make an appropriation for the purpose of paying the cost of a plat or survey of part of the territory in the county, in the instant case, the Town of York. Obviously, when the Board of Revenue levies a tax, it levies it on property included within the limits of the Town of York. The levying of a tax is one of the functions of the Board of Revenue. Section 6755 of the Code of Alabama, 1923.

It appears that the above referred to Section of the Code, (sub-section 10), specifically provides that such contract may be entered into by the Board of Revenue.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 21, 1928.

The Alabama Real Estate Commission,
CAPITOL.

Authority of Alabama Real Estate Commission to revoke broker's and salesman's license.

Opinion by Assistant Attorney General Smith.

Gentlemen:

I have your letter of November 28, 1928, in which you refer to the Act creating the Alabama Real Estate Commission. (General Acts, 1927,

p. 335). You state that the Act, creating the Commission provides that the Commission has authority to issue licenses to real estate brokers and salesmen, and that it also has authority to revoke the licenses of such brokers and salesmen.

You request my opinion:

Can the Alabama Real Estate Commission revoke a salesman's license for acts or conduct of such salesman before the Act creating the Commission became effective?

Section 8 of the Act creating the Alabama Real Estate Commission (General Acts, 1927, p. 341) provides the only grounds authorizing the Commission to revoke licenses of real estate brokers or real estate salesmen, said section is as follows:

"Section VIII. The Commission may upon its own motion and shall upon the verified complaint in writing of any three persons, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection therewith, shall make out a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either such capacity within this State, and shall have the power to suspend or to revoke any license issued under the provisions of this Act, at any time where the licensee has by false or fraudulent representation obtained a license, or where the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of: (a) making any substantial misrepresentation, or (b) making any false promises of a character likely to influence, persuade or induce, or (c) pursuing a continued and flagrant course of misrepresentation or making of false promises through agent or salesman or advertising or otherwise, or (d) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts or (f) Representing or attempting to represent a real estate broker other than the employer, without the express knowledge and consent of the employer, or (g) failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others, or (h) Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or (i) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Act, or (j) Any other conduct, whether of the same or a different character from that hereinbefore specified, which constitutes improper, fraudulent, or dishonest dealing. Any unlawful act or violation of the provisions of this Act by any real estate salesman, employee, or partner or associate of a licensed real estate broker, shall not be cause for the revocation of a license of any real estate broker, partial or otherwise, unless it shall appear to the satisfaction of the Commission that said employer, partner, or associate had guilty knowledge himself."

The Act creating the Alabama Real Estate Commission became effective January 1, 1928, and is a penal statute. Section 22 of the Constitution of 1901, provides that no ex post facto law shall be passed by the Legislature, aside from this the Supreme Court of Alabama has held that, "A statute has no retroactive effect or operation unless it is plain from the terms that the Legislature so intended it to operate."

Leehart, et al vs. Dudmeyer, et al, 158 Alabama, p. 295.

Smith vs. Kolb, et al., 58 Ala. 645.

After a careful study of the above mentioned Act I am unable to find any provision therein which would show or tend to show that the Legislature intended that any of its provisions should be retroactive.

Therefore in view of the above mentioned provision of the Constitution and decisions of the Supreme Court of Alabama I am of the opinion that the Alabama Real Estate Commission has no authority to revoke the licenses of real estate brokers or real estate salesmen for acts or conduct which occurred before the above mentioned Act became effective January 1, 1928.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

December 21, 1928.

Mr. A. P. Henderson,
County Engineer,
Athens, Limestone County, Alabama.

Dear Sir:

County Engineer—County required to pay premium on bond of.

Opinion by Assistant Attorney General Rayburn.

I have your letter of November 8, 1928.

You request my opinion:

Is a charge for the premium on the bond of the county engineer of Limestone County, Ala., a legitimate charge against said county?

In answer to your inquiry it is my opinion that said premium is a proper and legal charge against said county.

Under an Act approved September 19, 1923 (Local Acts 1923, p 193), the office of county engineer for Limestone County was created, and said engineer is appointed by the court of county commissioners for a term of four years, and his bond is fixed at \$5000.00.

Under the authority contained in Section 2658, Code of Alabama, 1923, the premiums on the bonds of county officers are payable out of the county treasury. By virtue of the Act creating the office of county engineer for Limestone County, said office is a county office, and the person holding

the same is a county officer within the meaning of Section 2658, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 21, 1928.

Judge of Probate,
Chatham, Washington County, Alabama.

Counties are liable under Section 6790, Code of Alabama, 1923, for injuries to horses and mules caused by agents operating dipping vats.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of December 8, 1928, in which you state as follows:

"Section 6790 of the Code of Alabama provides that the Court may indemnify parties for injury to cattle caused during dipping under certain circumstances. It does not however include horses and mules and we desire to know if the Court would in your judgment have the authority to pay for horses and mules injured the same as cattle. Again, would it be necessary in allowing a claim of this kind to let the record show that there was evidence of the negligence of the inspector, etc., to make it a valid claim?"

In answer to your inquiry I am of the opinion that horses and mules are required to be dipped under Section 1243, Code of Alabama, 1923, which is as follows:

"Horses, mules, etc., to be dipped.—All horses, mules and asses kept in tick infested lots, pens, pastures, or ranges shall be dipped regularly every two weeks, in the same way and under the same requirements as for cattle, until released from state or federal quarantine."

This section of the Code should be read in connection with Section 6790, and damages paid accordingly. I am further of the opinion that the minutes of the Board of County Commissioners should show that the claim has been investigated and evidence produced to show that such injuries, damages or death was caused by the failure or negligence of the regularly qualified inspector commissioned by the state livestock sanitary board, or that there was negligence on the part of an officer or employe of the State or the State Livestock Commission, and that there was no negligence on the part of the owner or person in charge of such cattle that contributed to the injury, damage or death.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 28, 1928.

Tax Collector,
Centreville, Bibb County, Alabama.

Amendment to Constitution 1901, sailors and soldiers exemption.
Section 194½ construed.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 17, 1928. I gather from it you desire an opinion from me construing amended Section 194½, Constitution of Alabama, 1901, which Section is commonly known as the sailor and soldier exemption amendment.

The first legislation on this subject was passed in 1919. The Act submitting this question to the voters of the State was approved September 26, 1919 (General Acts, 1919, page 724). This was an attempt to amend the Constitution by adding thereto Section 194½. Our Supreme Court held the original Act unconstitutional for the reason that the proposed soldiers and sailors tax exemption amendment never became a part of the Constitution; the Legislature not having appointed the day on which the election thereon should be held, as required by Section 284 of the Constitution of 1901, but delegated the duty to the Governor.

Hooper vs. State, ex rel Fox, 206 Ala. 371.

Again in 1921 special session the Legislature passed another Act seeking to amend the Constitution of 1901, so as to exempt sailors and soldiers of the World War from payment of poll taxes which had accrued or might accrue prior to October 1, 1923. This Act was approved October 21, 1921, (General Acts, Special Session, 1921, page 4). An election for the adoption or ratification of this amendment was fixed by the Legislature and was held on the first Monday after the expiration of three months from and after the final adjournment of the present extra session of the Legislature at which this amendment was proposed. This proposed amendment was submitted to the people and ratified by them on January 30, 1922, and became operative by proclamation of the Governor on February 13, 1922, and is as follows:

"No person who honorably served in the military or naval service of the United States between January 1, 1917, and November 11, 1918, shall be required to pay the poll tax mentioned in the Constitution of Alabama prior to October 1, 1923; such persons shall be exempt from the payment of all poll taxes which have or may hereafter accrue prior to October 1, 1923. This section shall be self executing and retro-active. The judges of probate shall issue certificates of exemption from the payment of such poll taxes to the persons entitled thereto under such rules and regulations as may be prescribed by the Governor."

The above amendment appears in the Code of 1923 as Section 194½ of the Constitution.

Again in 1923, Section 194½, *supra*, of the Constitution of 1901, was amended. The bill proposing this amendment was approved September 27, 1923 (General Acts, 1923, page 572). This proposed amendment was submitted to the people of the State November 4, 1924, and became a law November 15, 1924, by proclamation of the Governor.

Said amendment is as follows:

"No person who honorably served in the military or naval service of the United States between January 1, 1917, and November 11, 1918, shall be required to pay the poll tax mentioned in the Constitution of Alabama; such persons shall be exempt from the payment of all poll taxes which have accrued or may hereafter accrue. This section shall be self-executing and retroactive. The Judge of Probate shall issue certificates of exemption from the payment of such poll taxes to the persons entitled thereto under such rules and regulations as may be prescribed by the Governor."

It is clear that all persons falling within the terms of the above Section of the Constitution are exempt from all poll taxes which have accrued or may hereafter accrue for the reason that the law by its own provision is self-executing and retroactive.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 28, 1928.

Probate Judge,
Wedowee, Randolph County, Alabama.

Justices of the Peace: After making bond and having it approved, filed and recorded by the probate judge, cannot withdraw, cancel or substitute a new bond.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of December 11, 1928, in which you request the opinion of the Attorney General on the following question of law:

Can Justices of the Peace who were elected in the November election for the various precincts of your county and who have made bonds in surety companies cancel their bonds and substitute personal bonds?

In answering your question I direct your attention to Section 8703 of the Code of Alabama, 1923, which is as follows:

"Bond; by whom approved.—Before entering on the duties of the office, they must give bond and surety, payable and conditioned as

provided by law, in the sum of one thousand dollars, which bond must be approved by the judge of probate of the county, and filed and recorded in his office."

In view of the above cited Section of the Code I am of the opinion that where a Justice of the Peace who has been elected and before entering on the duties of the office has given bond and the bond has been approved by the Judge of Probate of the County and been filed and recorded in his office, there is no authority for cancelling or substituting another or different bond, and the Judge of Probate has no authority to cancel, withdraw or substitute a different bond. However, should a Justice of the Peace after his election and before entering on the duties of the office present a good and sufficient bond signed by persons other than a surety company it would be your duty as Judge of Probate to approve same, and have said bond filed and recorded in your office as provided in the above quoted section of the Code.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 29, 1928.

Hon. H. P. Rogers,
Deputy Solicitor,
Greenville, Butler County, Ala.

Dear Sir:

Salary of Deputy Solicitor for Butler County, Alabama. Local Act, 1923, p. 29, construed.

Opinion by Assistant Attorney General Rayburn.

I have your letter of July 20, 1928. You state that as Deputy Solicitor of Butler County, Alabama, by the Act approved Feb. 10, 1923 (Local Acts, 1923, p. 29) your salary is fixed at \$1200.00 per annum, payable in monthly installments of \$100.00 per month, and that said salary is paid from the fees "earned" by such solicitor in the county court, and should the fees so "earned" in the county court be less than the sum of \$1200.00 per annum, then the salary of the deputy solicitor for said county shall be the fees "earned" in the county court of said county for the calendar year.

You request my opinion:

In the event that the total solicitor's fees for all convictions in the county court in the month of February, 1928, were \$225.00, \$75.00 being paid in cash; \$100.00 secured by confessed judgments for fines and costs, and the balance for all cases sentenced to hard labor for the county, will said fees be "earned" when confession of judgment is taken or will they be "earned" when the same are collected by the Clerk of the County Court?

It is my opinion that said fees are "earned" within the meaning of the Act here considered when actually collected by the clerk of the county court. Said fees could not be legally paid to you as deputy solicitor until the clerk has collected same.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 2, 1929.

Hon. J. Lamar Kelly,
Mayor,
Evergreen, Ala.

Power of Mayor and council of town to offer reward for criminals.

Opinion by Assistant Attorney General Haynes.

I have your letter of December 7, 1928, in which you request my opinion as follows:

"Please advise me if in your opinion the Mayor and Council of a Town, acting under Section 4163 of the Code of 1923, has a right to offer a reward for information leading to the arrest and conviction of persons violating the prohibition law, or for that matter any ordinance of the Town."

"If you advise that the Town has no right under this Section, then what is your opinion as to the legality of the Officials of a Town offering a reward to informers against persons violating the prohibition law?"

It is my opinion you may as mayor in connection with your council offer a reward for persons charged with crime and this authority is given you by Section 4163, Code of Alabama, 1923, but the payment of the same is contingent upon conviction. Said Section is as follows:

"High Crimes and Misdemeanors; Town Reward.—When a high crime or misdemeanor shall have been committed in any town, its mayor and council may offer, publicly, a reward not exceeding two hundred dollars, to the person who shall give information leading to the arrest and conviction of the guilty person; which reward shall be paid to the informer by the town, by order of the court before which such conviction is had."

In answering your second inquiry, will say that the mayor and council of any incorporated town or city may employ as many marshals as the ordinances of their city or town authorize to do undercover work or any other peace officers work designated by them for the town or city.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 3, 1929.

The County Superintendent of Education,
Ozark, Dale County, Alabama.

Dear Sir:

District tax—Use of.

Opinion by The Attorney General.

I have your letter of December 31st, in which you state that a special three mill district tax was voted in a certain school district in your county for the specific purpose of **erecting** and **equipping** a school building. You further state that there is a balance on hand after this district has been consolidated with another district. You also state that you desire to use a part of the balance in repairing a well on the school grounds of the school in the original district No. 5, where the original tax was voted for the purposes above stated.

You request my opinion:

May the County Board of Education use a portion of said balance in repairing a well on said school grounds?

I am of the opinion that the County Board of Education may authorize the County Superintendent of Education to use a portion of said balance for said purpose. In my judgment, the repairing of the well under the circumstances set forth by you, is a part of the equipment contemplated.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

January 3, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Rewards—Seizure fee of \$50.00 not proper charge on conviction of an attempt to distill.

Opinion by Attorney General McCall.

Dear Sir:

You state that one of your Assistant Examiners, examining the records and accounts of a certain county public official finds that the sheriff of said county has collected a seizure fee of \$50.00 in cases where persons were charged with distilling but convicted of attempt to distill prohibited liquors.

You request my opinion:

Where a person is charged with the offense of distilling prohibited liquors and convicted only of the offense of attempting to distill, may

there be added and legally charged as an item of cost, a seizure fee of \$50.00 to be paid to the sheriff or officer apprehending the offender?

I am of the opinion that said seizure fee is not a legal charge under such circumstances. The offense of attempting to distill prohibited liquors is not a violation of the prohibition laws. The attempt is a different offense within itself. Inspection of the statutes applicable to the payment of rewards or seizure fees, in such cases, shows clearly that the seizure fee of \$50.00 is legally chargeable only on conviction of the offense of distilling.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 4, 1929.

The Adjutant General,
State Capitol,
Montgomery, Alabama.

Dear Sir:

Taxation: Municipality has no authority to levy tax on property of arm or instrumentality of the State.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of recent date.

You inquire whether or not a municipality may levy a tax upon property owned by the National Guard of the State of Alabama for paving done around such property.

A municipality may not levy and collect a paving tax from the National Guard under the circumstances set out in your letter.

The Alabama National Guard is a recognized arm and instrumentality of the State.

It is a well settled principle of law that the State or an arm or instrumentality thereof may not be taxed by a municipality.

City of Huntsville v. Madison Co., 166 Ala., 389;

Opinion of Attorney General to Probate Judge, Henry County,
Oct. 12, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 4, 1929.

Hon. C. A. Moffett, Member,
Alabama Bridge Corporation,
CAPITOL.

Dear Sir:

Bridge corporation—Instrumentality of State—Not necessary to affix
Federal Revenue Stamps on bonds of.

Opinion by The Attorney General.

I have your letter of December 29, 1928, in which you request an opinion as to whether or not the Alabama Bridge Corporation of which you, in your capacity as President, State Board of Administration, are, ex officio a member, is a private corporation, and also, whether or not Federal Revenue Stamps must be affixed to the bonds issued by said corporation for bridge building purposes.

Your attention is invited to Alabama State Bridge Corporation, et al v. Smith, 116 So. 695, 698, wherein the Court, speaking of said corporation, said:

"It is an arm of the State with none of the limitations, disabilities or responsibilities that affect private corporations as such."

In my opinion, the Alabama Bridge Corporation is an instrumentality or agency of the State.

As such, I am of the opinion that the stamps mentioned by you are not necessary on bonds legally issued by it for bridge building purposes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 4, 1929.

The Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.

Dear Sir:

Agricultural Code—disposition of copies of.

Opinion by The Attorney General.

I have your letter of January 2nd by the Chief, Division of Weights and Measures, Department of Agriculture and Industries, inviting my attention to Article 24 of the Agricultural Code of 1927, and stating that your department desires to furnish free copies of said Code to the City Attorney of Birmingham and the Department of Weights and Measures of said city.

You request my opinion:

May the Department of Agriculture and Industries, or any other department furnish, free of charge, copies of the Agricultural Code of

1927, to the City Attorney and to the Department of Weights and Measures of the City of Birmingham?

I can find no authority for you to do so.

Your attention is invited to Section 4 of the Act approved August 24, 1927, adopting the Agricultural Code. That section does not permit the free distribution of copies of said Code to city officials. Unless you can point to some law providing otherwise, in my judgment, copies of the Code can be procured by said officials only by paying the purchase price fixed according to Section 4 of said Act.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Jan. 7, 1929.

Judge of Probate,
Luverne, Crenshaw County, Ala.

Motor vehicles used exclusively for transporting children to and from school require neither license nor tag.

Motor vehicles owned and used by county school boards for purposes other than transporting children to and from school require no license but must carry tag which may be obtained without cost on application by proper official to judge of probate of Montgomery County.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of November 14, 1928, is acknowledged.

You wish my opinion upon the following questions:

1. Are school busses owned by the county board of education exempt from payment of license tax for being operated on the public roads of the State?

2. If exempt from license tax, must they have tags at the cost of fifty cents each as provided for motor vehicles owned by a county?

3. Where a county superintendent of education, doing school work, operates, on the public roads of the State, his own automobile, is he required to take out a license to operate such automobile, or may he pay fifty cents for a tag and operate without a license?

The reply to each of your questions depends upon the proper interpretation of the following provisions of the statutes of this State:

Act No. 163, approved July 22, 1927 (Acts 1927, p. 139 et seq.)

"Section 1. Every person, firm, company, corporation or association, * * * *, who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure such

license, * * * *, and shall pay for the exercise of such privilege the amounts hereinafter provided and shall comply with all other provisions of this Act or any other Act."

"Section 17. For each motor truck the following license shall be charged and paid;" * * * * * "provided this section does not apply to automobile trucks used exclusively for transporting children to and from school. Motor trucks or motor vehicles used by the State or county or any municipality of this State shall not be liable for the payment of this tax, but shall carry tags:"

Act No. 290, approved Sept. 13, 1923, (Acts 1923, p. 284 et seq.)

"Section 22. * * * * *. Nothing herein contained shall be construed so as to impose a license tax on motor vehicles **owned** and **used** by any municipal corporation or county, in this State, but all such vehicles shall bear a numbered tag, which the judge of probate is authorized to deliver without the payment of any fee or charge, except the sum of fifty cents to cover the cost of each tag delivered by him to such municipal corporation or county, and the proceeds of such payment shall be made to the State Treasurer without any deduction for commission by the probate judge. Cars **owned** by the State shall also be required to bear a numbered tag, application for which shall be made to the probate judge of Montgomery County, and said probate judge is hereby authorized and required to deliver without cost such tag and receipt upon application of the proper official."

Said Section 17 of the 1927 Act is, for the purposes under consideration, but a reenactment of Section 16 of said Act No. 290 of 1923. It, therefore, follows that to determine the legislative intent in regard to the matters inquired about, said Section 17 must be considered in connection with and in the light of said Section 22 of the 1923 Act,—both of which sections now constitute parts of the law controlling the licensing of motor vehicles. When so considered, it is my opinion that in order to exempt a motor vehicle owned by the county board of education, from the license tax under the provisions quoted from said Section 17 of the 1927 Act and from said Section 22 of 1923 Act, it must be "used exclusively for transporting children to and from school"—in which case neither license nor tag is required—, or must be **used by the county board of education** for purposes other than transporting children to and from school, in which case the motor vehicle is "required to bear a numbered tag." In order to obtain such tag, application must be made to the judge of probate of Montgomery County by the proper official—the chairman of the county board of education—and such judge of probate is then "required to deliver without cost such tag and receipt."

The county board of education is an arm of the State.

White v. Alabama Insane Hospital, 139 Ala. 479;

Cox v. Board of Trustees of the University of Alabama, 161 Ala. 629.

Motor vehicles owned and used by a county board of education are, in contemplation of law, owned and used by the State. Motor vehicles, used exclusively for transportation of children to and from school, require neither license nor tag, as the law with regard to license does not apply to such motor vehicles.—Said Section 17, of Acts 1927. Motor vehicles owned by the county board of education and used by it for purposes other than the transportation of children to and from school, do not require a license but must bear a tag. Said Section 17, Acts 1927. This tag may be obtained by application to the judge of probate of Montgomery County, without charge therefor as heretofore stated.

The foregoing answers your first and second questions.

In reply to your third question will say that no exemption from license tax is provided by law for an automobile owned by a county superintendent of education. The fact that he uses such automobile in attending to his official duties does not exempt the automobile from the license tax. Exemptions from taxation are strictly construed against the one claiming such exemption. As said in Cooley on Taxation, 3d Edition, p. 357 et seq:

"It is also a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary it ought to receive a strict construction; for the reasonable presumption is that the State has granted in express terms all it intended to grant at all."

I find no express provision of law exempting from license tax an automobile owned by an officer, although used by him in the discharge of his official duties.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 8, 1929.

Clerk, Circuit Court,
Fayette, Fayette County, Alabama.

Making of official bond of Clerk of the Circuit Court. County has no power to provide deputy for Circuit Clerk.

Opinion by The Attorney General.

Dear Sir:

I have your letter of November 26, 1928. In it you state that in 1922 you made bond as clerk of the Circuit Court of Fayette County with personal sureties. Now you are taking office under a new term. You also indicate that you want the County to furnish you with a deputy clerk. You request my opinion:

First. May you make bond with personal sureties for your new term which begins January 14, 1929?

Second. May the County furnish you with a deputy circuit clerk and pay his salary?

In answer to your first inquiry will say that your bond for your new term must be made with a surety or guaranty company as provided by Section 2658, Code of Alabama, 1923, which became effective August 16, 1924. The bond which you made in 1922 was made before August 16, 1924, and hence was legal.

Section 2658, *supra*, has application only to terms of office beginning on or after August 16, 1924.

In answer to your second question will say that I know of no provision of law whereby your county is authorized to pay for a deputy circuit clerk to assist you in the performance of your duties.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 8, 1929.

The County Superintendent of Education,
Hartselle, Alabama.

County Superintendent of Education—must maintain office at county seat.

Opinion by Attorney General:

Dear Sir:

I have your letter of December 28, 1928, inviting my attention to the School Code of Alabama, 1927, and stating that you desire to maintain the office of County Superintendent of Education for the next year at Hartselle, Alabama, which is not the county seat.

You request my opinion:

May the office of the county superintendent of education be located elsewhere than at the county seat?

I am of the opinion that under the law it cannot be located elsewhere than at the county seat.

This office has repeatedly ruled that the office of the county superintendent of education must be at the county seat and not elsewhere. Provisions as to the location of county offices is set forth in the Code of Alabama. Also your attention is invited to Section 169, School Code, 1927, which states that you are required to maintain an office at the county seat, and that the board of revenue or court of county commissioners shall provide you and your assistants with ample, convenient and comfortable office quarters, and what office quarters you are to keep at the county seat is exclusively within the province of the county board of revenue or county commissioners' court, and

you have nothing to do with it except to implore them to give you the best you can get.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 9, 1929.

The Tax Collector,
Camden, Wilcox County, Alabama.

Dear Sir:

Commissions of Tax Assessor and of Tax Collector governed by statutes existing at time of adoption of Code 1923. Section 3040 and 3048 of Code void.

Opinion by Assistant Attorney General Evans.

I find from my files that your request for an opinion of date November 25, 1927, has not been answered. This request was that I answer certain questions propounded to you in a letter which you enclosed from J. W. Mailey, Inspector. The questions are as follows:

1st. Was the Tax Collector entitled to the 2% commission on special taxes, such as school taxes referred to in Section 3048 of the Code, 1923, during the two years additional term of his office?

2nd. Did the additional term of office begin October 1, 1925?

3rd. Was the Tax Assessor entitled to the 2% commission on special taxes, such as school taxes referred to in Section 3040 of the 1923 Code, during the two years additional term of his office?

In reply will say that the Act adopting the Code, 1923, (Act No. 160, approved August 17, 1923, Acts 1923, p. 127) provided that, "no statute applying to the revenue laws of this state, or to taxation, * * * or relating to such subjects, shall be repealed or affected in any manner by the adoption of this Code, or by the failure to incorporate each statute as a part thereof."

Such being the case, it is my opinion that Sections 3040 and 3048 of the Code 1923 are inoperative and invalid, since, if valid, they would necessarily repeal or materially affect prior, valid, existing statutes fixing the commissions of tax collectors and tax assessors. The law governing the commissions of tax collectors is found in Act No. 33, approved November 1, 1921, Acts 1921, pages 48 and 49; and the law governing the commissions of tax assessors is found in Section 37 of Act No. 328, approved Sept. 15, 1919, (Acts 1919, p. 297) together with said Act No. 33.

It is clear, in my opinion, that the statutes providing for commissions to tax assessors and tax collectors are statutes applying to revenue laws of the state, or to taxation, or, at least, relating to such subjects. As already stated, the Act adopting the Code not only preserves all statutes applying to the revenue laws of this State, or to taxation, or relating to such subjects, but further provides that such statutes shall not be repealed or affected by the adoption of the Code. This, in my opinion, necessarily means that if there is

in the Code a provision that cannot reasonably be construed without having the effect of repealing or affecting such statutes, such provisions in the Code must be considered as void. Hence, Sections 3040 and 3048 of Code 1923 need not be considered in ascertaining the commissions to which a tax collector or tax assessor is entitled.

Such being the case it is unnecessary to consider the effect of the two year extensions of term of office of tax assessor and tax collector granted by Section 86 A of Act No. 172, approved Aug. 22, 1923, (Acts 1923, p. 198).—*Dorlan v. Blan*, as Auditor, So. Rep. Vol. 118, 682 et seq., recently rendered by the Court of Appeals of Alabama.

The opinions of this office heretofore rendered, in so far as they construe sections 3040 and 3048 of the Code, 1923, to be valid statutes, being opinions of July 15, 1927, August 1, 1927, August 13, 1927, Sept. 25, 1928 of this period and all opinions prior thereto, are hereby overruled.

As to special county and district school taxes the assessor and collector are entitled to the commissions provided for by said Act No. 33, that is, "such commissions as may be allowed by the Commissioners Court, Board of Revenue or other governing bodies of the several counties of the State, to be not more than one per cent, as fees on all school funds assessed and collected by them, to be paid out of such special school taxes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 9, 1929.

Tax Collector and Tax Assessor,
Andalusia, Covington County, Alabama.

The holder of a lien on personal property may pay the tax thereon and release such property from payment of other taxes assessed to the tax payer.

Opinion by Assistant Attorney General Evans.

Dear Sirs:

Receipt of your letter of December 27, 1928, is acknowledged.

You make the following statement of facts:

On February 27, 1928, one R. S. Taylor bought of the Thew Shovel Co., of Lorraine, Ohio, one gasoline shovel for the price of Fourteen Thousand and Twenty-five Dollars, which was shipped to R. S. Taylor, Covington County, Alabama. The sale of this shovel was under a conditional sale contract, the seller retaining the title to the shovel until paid for as security for the purchase money. Under the contract, R. S. Taylor was to pay \$500.00 cash with order, \$3,000.00 on arrival and the balance in notes maturing at different dates.

R. S. Taylor returned this shovel, with other property, to the tax assessor of Covington County, for assessment against him for the then

current tax assessment year. The property so returned was duly assessed the aggregate assessment value of all the property so assessed against R. S. Taylor being \$22,725.00.

R. S. Taylor paid \$3,500.00 of the purchase price, failed in business, and surrendered the shovel to the Thew Shovel Co. with understanding that the amount paid should be taken as rent for the time it was used by him.

Thew Shovel Co. now asks that it be permitted to pay the taxes on the assessment value of the shovel and that said shovel then be released from levy for sale for payment of taxes on other property assessed to R. S. Taylor.

You ask if the Thew Shovel Company has the right to have the shovel released to it on payment of such taxes?

The shovel having been brought into this State after the first day of October, 1927, and before the Tax Assessor had completed his assessment for the tax assessment year beginning on said date, was properly assessable.—Subdivision N Section 5, Act No. 328, approved Sept. 15, 1919 (Acts 1919, page 287). The Tax Assessor completes his assessments not later than the last Monday in March of each assessment year.—Section 38, Act No. 172, approved August 22nd, 1923 (Acts 1923, page 175).

The shovel was properly assessed to the purchaser, R. S. Taylor.—State vs. White Furniture Co., 206 Ala. 576; State vs. Seals Piano Co., 209 Ala. 94.

The Thew Shovel Co. having a lien upon the shovel, may pay the tax thereon with interest and penalties and have the shovel released from the levy.—Section 411 of said Act No. 328, (Acts 1919, page 448).

The shovel having been bought and brought into this State during the assessment period, its value for assessment was, presumptively, sixty per cent of \$14,025.00.

The provision of said Section 411 in regard to real estate has been changed to some extent by Act No. 578, approved October 1, 1923, (Acts, 1923, page 750); but this act does not, in my opinion, affect said Section 411 as applied to personal property. There is no conflict between said Section 411 and said Act No. 578 so far as personal property is concerned.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 11, 1929.

The Clerk of the Circuit Court,
Tuskegee, Macon County, Alabama.

Dear Sir:

Fees: Sheriff and Clerk entitled to fees accrued up to the withdrawal and filing of indictment. Such fees are a charge against the fine and forfeiture fund of the county.

Indictments: Solicitors may, with consent of court in term time withdraw and file indictment after two copies have been issued and return made "not found."

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your letter of December 26, 1928, in which you inquire as follows:

1. Are the clerk and sheriff entitled to fees accrued up to the withdrawal and filing of indictment, such fees to be paid out of the fine and forfeiture fund of the county?

2. Can the solicitor withdraw and file an indictment, with leave of court, in term time, where two copies have been issued and return made "not found?"

Section 4548 of the Code of 1923 answers your second inquiry in the affirmative.

Scott v. State, 94 Ala. 80.

Under the circumstances provided in the above mentioned section of the Code when the indictment has been withdrawn and filed, the officers of the court are entitled to have their fees which have accrued, paid out of the fine and forfeiture fund.

Section 4039, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 11, 1929.

The State Auditor,
CAPITOL.

Officers salaries: Succeeding officer entitled to salary for day change takes place.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter requesting an opinion on the following question of law:

Shall I pay Circuit Judges who are retiring from office 1st to 13th inclusive, and pay incoming judges from 14th to 31st inclusive, as it would appear from Section 2714; or inasmuch as the designation of the term says FROM the first Monday after the second Tuesday in January, shall I pay the retiring judges from January 1st through the 14th, inclusive, and the incoming judges from January 15th to 31st inclusive?

I am of the opinion that retiring Circuit Judges term of office expires at midnight Monday of January 14, 1929, and that the term of their successors commences on Tuesday, January 15, 1929.

I therefore advise that you pay the salaries of out going circuit judges

from January 1 to 14th, both inclusive, and that you pay the incoming circuit judges from January 15 to January 31, both inclusive.

Oberhause v. State ex rel. McManara, 173 Ala. 483.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 12, 1929.

The Superintendent of Education,
Scottsboro, Jackson County, Alabama.

Cases for violation of school attendance law tried in Juvenile Court.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of December 21, 1928. You state that the procedure for the enforcement of the school attendance law is not clear to you.

You request my opinion:

If a man refuses to send his children to school should proceedings be instituted against him in the Juvenile Court or in the County Court?

In my opinion, proceedings in the above case should be instituted in the Juvenile Court.

Section 320, School Code, 1927, expressly provides for such procedure to be instituted in the Juvenile Court. This Section should be considered and enforced in accordance with Sections 3528 to 3559, both inclusive, of the Code of 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 12, 1929.

The Adjutant General,
State Capitol,
Montgomery, Ala.

Appropriation from Military Fund to Y. M. C. A. illegal.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of December 29, 1928. You request my opinion:

Legally, may an appropriation be made from the military fund of the State of Alabama to the State Association of the Y. M. C. A. where said

funds are to be used solely for the benefit of the Alabama National Guard?

In answer to the foregoing inquiry, I advise you that such an appropriation may not legally be made.

The law applicable to the expenditure of public funds is strictly construed, and no expenditures may legally be made therefrom in the absence of an express provision therefor. I find no authority of law which would justify the appropriation named by you.

Mobile County v. Williams, 188 Ala. 639.

The valuable services performed by the Y. M. C. A. for the Alabama National Guard, however meritorious and commendable they may be, cannot justify the appropriation here considered.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

Mr. J. B. Walker,
Justice of the Peace,
Montgomery, Alabama.

Jurisdiction of Justice of Peace. Extension of corporate limits by the City of Montgomery.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of January 4, 1929, in which you request my opinion:

"As Justice of the Peace in Precinct 18 of the County of Montgomery, can I exercise the powers of a Justice of the Peace in that part of my precinct which lies within the City of Montgomery?"

In answer to your question, I am of the opinion that you cannot exercise any of the powers of a Justice of the Peace in Precinct 18 lying within or partly within the City of Montgomery.

Constitution 1901, Section 168.
Roden vs. State, 73 So. 657.

The corporate limits of the City of Montgomery were extended by an Act of the Legislature approved August 26, 1927, (Local Acts 1927, p. 305) which said Act became effective September 30, 1927.

I am not unmindful of the Act approved August 30, 1927, (General Acts, 1927, p. 496), attempting to continue in office justices of the peace in territory annexed to the City of Montgomery.

When the Legislature created the Court of Common Pleas of Montgom-

ery, in lieu of all justices of the peace in said city, it abolished the office of Justice of the Peace under Section 168 of the Constitution.

Alford v. Hicks, 142 Ala. 355.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

Judge of Probate,
Rockford, Coosa County, Alabama.

One who marries the first cousin of another is, under the rule of the civil law, related by affinity to such other in the fourth degree.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of January 11th is acknowledged. You ask that I advise you what degree of relationship one man, who has married the first cousin of another man, is to such other man.

In reply will say that under the law of Alabama relationship is governed by the rule of the civil law.

Code 1923, Section 7368 and subdivision 4 of Section 8610.

Section 8610 of the Code 1923, as regards relationship, is but a reenactment of Section 5016 of 1896 Code. Said provision of the 1896 Code was interpreted in the case of Danzey vs. State, 126 Ala. 15. In that case the Supreme Court of Alabama say:

"The competency of Jurors in respect of their relationship to persons is regulated by statute. Code, Section 5016. When existing only by affinity, the relationship does not disqualify unless within the fifth degree as computed by the Civil Law rule. By that rule as applied to collaterals, the count begins at one of the persons in question and proceeds up to the common ancestor, and then down to the other person, calling it a degree for each person both ascending and descending, and the number thus counted expresses the degree of kinship."

This provision of the Code of 1896 as above interpreted has been reenacted in both the Codes of 1907 and 1923 and must now be considered as a settled rule of law in the State of Alabama.

Morrison v. Stevenson, 69 Ala. 448; Duramus v. Harrison, 26 Ala. 326; Wood Dickerson Supply Co. v. Cocciota, 153 Ala., 555.

The proper interpretation of the rule, as laid down, counts from one of the persons being considered up to, but does not count the common ancestor and on the collateral line, down from, but not counting the common ancestor. It will be noted that the rule as stated does not include, in the count, the

common ancestor, but counts up to and down from the common ancestor. To include the common ancestor would make a man kin to himself in the first degree. This, of course, is not meant. In a legal sense, a man is not one of his own relatives; nor in any other sense that I can imagine.

Counting as above stated, one who has married the first cousin of another is related to such other, by affinity, in the fourth degree.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

The Superintendent of Education,
Clayton, Barbour County, Alabama.

Title to school property vests in County Board of Education.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of December 1, 1928, in which you state that the Corinth School in your County has been taught in a State aid school building. You also state that the citizens built a teacher's home near the school with the proceeds of money derived from box suppers, donations, etc. You further state that there are no public school monies, in the usual sense of the word, invested in the lot on which the teacher's home is located. You state in your letter that Corinth school has been consolidated with Blue Springs School and that the school building and teacher's home have been abandoned for school purposes.

You request my opinion:

"Does title to the teacher's home rest in the County Board of Education under Section 95 of the Alabama School Code, 1927, or do the three men who were serving as trustees of Corinth School at the time it was in existence and to whom the title to the teacher's home was conveyed, have authority to dispose of the teacher's home and use the proceeds as they deem fit and proper?"

In my opinion, the title to the above property vests in the County Board of Education under authority of the above Section 95. Said section provides that the title to school property vests in the County Board of Education. The teacher's home referred to above, was purchased for school purposes and when the donations were made by the various citizens it was understood that such donations were to be used for such purposes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

Hon. Curtis Matthews,
Superintendent of Education, Wilcox County,
Camden, Alabama.

Construction of Section 137, School Code, 1927.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of January 10th is acknowledged.

You state that some three or four years ago Pine Hill School District No. 53 of Wilcox County had its vocational school building burned. In order to rebuild, several leading citizens gave their note to a bank at Pine Hill for an amount necessary to rebuild. These people would like to issue warrants against the district tax fund to take up the balance due on this note which is approximately \$2,500.00.

You wish my opinion upon the legality of such action.

In reply will say that warrants can be issued against a district tax fund in cases provided by law only. No one can issue warrants against a district tax fund except the County Board of Education. Section 137 of the Alabama School Code, 1927, provides as follows:

"District Tax May be Used for Building and Equipment. The respective county boards of education and city boards of education in the respective counties and cities of the State of Alabama may appropriate and use any district three mill tax that has been or may hereafter be voted in any school district to pay and discharge any obligations or debts which may have been or hereafter are created to build, furnish or equip a public school building for said school district, or to refund money out of the said three mill district tax to any person or corporation who has or may hereafter advance money for such purpose."

You will see from the foregoing that the County Board of Education may appropriate and use any district three mill tax that has been or may hereafter be voted in any school district to pay and discharge any obligations or debts which may have been or hereafter are created to build, furnish or equip a public school building for said school district, or to refund money out of the said three mill district tax to any person or corporation who has or may hereafter advance money for such purpose.

The note in question is obviously not an obligation of the County School Board. It is the obligation of those who signed the note. If those persons, who borrowed money from the bank, then advanced it to the County Board of Education for the purpose of building the school house for such district, then the County Board of Education may refund to such persons the money so advanced out of the three mill district school tax as it accrues, to the extent not otherwise specifically obligated. As much may be taken from such fund each year for such purpose as practicable. There is no provision of law in such a case for the issuance of warrants against such fund. Only

the use of such fund for the purpose of refunding the money so advanced is authorized.

The County Board of Education may estimate the amount that can be spared each year for such purpose and make order for payment accordingly. The records of the County Board of Education should show the facts upon which such payments are ordered.

If the money in question was given for the purpose, instead of merely advanced, then no refund can be made, since no obligation or debt would exist. Under such circumstances, to refund the money would itself be a gift of public funds by the County School Board, which is not permissible.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

Clerk, Circuit Court,
Jasper, Walker County, Alabama.

Executions on judgments in criminal cases should be issued in one year after judgment.

Where execution on judgment has not been issued within one year it should be revived.

Opinion by Assistant Attorney General Smith.

Dear Madam:

I have your letter of October 11, 1928, in which you request my opinion as follows:

1st. Does the failure to issue an execution upon a confession of judgment for fine and cost, **within a year** from date of judgment release sureties from paying same.

2nd. Is it necessary for the judgment to be revived if the judgment has not had execution issued within that time.

In answer to your first question I am of the opinion that a confession of judgment for fine and costs when entered by the Court becomes a civil judgment as provided in Section 5289 of the Code of 1923.

Therefore, treating a confession of judgment in criminal cases for fine and costs as if it were a civil judgment, all laws applicable to civil judgments would apply and particularly Section 7793, Code of Alabama, 1923, which is as follows:

“Executions on moneyed judgments, and for recovery of personal and real property; forms of.—The party in whose favor a judgment is rendered, whether for debt, damages, or costs, for the satisfaction thereof, may, within a year thereafter, have a writ of fieri facias against the lands and goods of the party against whom such judgment is rendered; and when the judgment is for specific property or the alternate value, or for

the possession of lands, appropriate writs of execution may issue for the satisfaction thereof; and such writs of fieri facias and of execution must substantially conform to the following forms: * * *

I am of the opinion that under the above quoted section an execution on a judgment issued after the lapse of a year, without a reviver by scire facias is not void, but voidable only at the option of the defendant. The Supreme Court of Alabama has decided as follows: "As to the delay beyond twelve months in the issue of execution, this is a mere irregularity, of which no one but the defendant can complain.

Collinsworth vs. Horn, 4 Stewart and Porter, p. 237.

Brevard executors vs. Jones, 50 Ala. 222.

In answer to your second question I am of the opinion that where no execution has been issued on a judgment within a year it should be revived as provided in Section 7863 of the Code of Alabama, 1923. This Section is as follows:

"Scire facias when execution did not issue.—No execution shall issue on a judgment or decree of the circuit or probate court on which an execution has not been sued out within ten years of its rendition, until the same has been revived by scire facias. If the defendant is a resident of the state, personal service must be had upon him, of the scire facias, requiring him to show cause within thirty days, why the plaintiff should not have execution. When the defendant is a non-resident, or cannot be found, service may be had in the manner provided by law for notice to nonresidents."

Miller vs. Shackelford, 16 Ala. 95,

Drennen vs. Dunn, 52 So. 313.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

Judge of Probate,
Montgomery, Montgomery County, Alabama.

For the judge of probate to issue a tag for the operation of a motor vehicle to a municipality or county, on payment of fee of fifty cents, the application should be by an official of the city duly authorized to make such application and should show that the motor vehicle is owned and used by the municipality.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of December 24, 1928, is acknowledged. You state that there has been filed in your office a number of applications by the City of Montgomery for the issuance of tags for motor vehicles without the

payment of license. You state that these applications are in substantially the following form:

"We, City of Montgomery, hereby make the following statement under oath:—That we are the owner of or control and operate a motor vehicle described as follows:" (here describing the motor vehicle).

(Signed) "City of Montgomery
By A. M. Anderson, Purchasing Agent."

You wish to know, if, upon such application you must issue the tag for such automobile on payment of fifty cents and without payment of the regular license charge for such motor vehicle.

The correct answer to your inquiry is dependent upon the proper ascertainment of the legislative intent in enacting the following provisions of statutes:

Act No. 163, approved July 22, 1927, (Acts 1927, page 139 et seq.)

"Section 1. Every person, firm, company, corporation or association * * *, who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege, the amounts hereinafter provided and comply with all the other provisions of this Act or any other Act."

"Section 17. For motor trucks the following license tax shall be charged and paid: * * * provided this section does not apply to automobile trucks used exclusively for transferring children to and from school. Motor trucks or motor vehicles used by the state or county or any municipality of this state shall not be liable for the payment of this tax, but shall carry tags."

Act No. 290, approved September 13, 1923, (Acts 1923, page 224, et seq.)

"Section 12. Automobiles. The following license tax or registration fee shall be charged on automobiles and motor cars kept for private use:" (here designating the amount that must be paid).

"Section 22. * * *. Nothing herein contained shall be construed so as to impose a license tax on motor vehicles owned and used by any municipal corporation or county in this State, but all such vehicles shall bear a numbered tag, which the judge of probate is authorized to deliver without the payment of any fee or charge, except the sum of fifty cents to cover the cost of each tag delivered by him to such municipal corporation or county," etc.

Each of the foregoing provisions copied now constitute part of the law relating to license of motor vehicles. Said Section 17 of the 1927 Act is but a reenactment of Section 16 of said 1923 Act, so far as the question under consideration is concerned; and said Section 17 must be construed together with and in the light of said Section 22 of the 1923 Act. The tag which the Judge of Probate is authorized by said Section 22 to deliver to any municipality or county, without the payment of any fee or charge, except the sum of fifty cents to cover the cost of the tag, is for motor vehicles **owned and used** by the municipality or county.

On reading the form of application filed as stated in your letter, I find the form of application used is a form prepared by the State Tax Commission for application for license to operate a motor vehicle. This is not a proper form for tag without payment of license. The form used shows that a license is due. The form for obtaining tag without payment of license should show that no license is due for using such automobile on the public highways of the State. To obtain such tag without payment of license, the application should state that the motor vehicle for which application for tag is made is **owned and used** by the municipality as provided by said Section 22, which provides for the issuance of such tag. The application for a license must show such facts as require a license, while the application for a tag, on payment of fee of fifty cents only, must show such facts as exempt such motor vehicle from the license.

Before application for tag on payment of only fifty cents is granted the application should be made by an official of the city, duly authorized by the municipality to make such application, and should state that the motor vehicle—which should be properly described—is owned and used by the municipality.

This is a case of claim of exemption from taxation. As said by Judge Cooley: "It is also a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary it ought to receive a strict construction; for the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant."—Cooley on Taxation, 3rd. Edition, page 357 et seq.

The statute provides for issuance of tag, on payment of fee of fifty cents, in cases only where the motor vehicle is owned and used by a municipality or county. To enlarge this provision by construction so as to include motor vehicles other than those owned and used by a municipality or county would be in violation of the rule of construction just stated.

It is my opinion that you should not issue a tag for motor vehicle to a city or county upon an application such as you say has been filed with you.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

County Treasurer of School Funds: Should take charge of money, funds, or proceeds of any character, which accrue to the county for public school purposes, and should pay out all such monies upon written order of the County Board of Education.

County Boards of Education not authorized to make allowances to County Superintendent of Education except salary.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of December 7, 1928, in which you state that there is given to the County Board of Education contributions of funds as a supplement for the general operation of particular schools in the county, and the information of the Examiner is that these funds are contributions to be used as a general supplemental to the other funds raised by taxation, local and county-wide, and the particular part of the State appropriation apportioned, by the county to these particular schools. Upon this statement of facts you request the opinion of the Attorney General on the following questions:

"1. Should not this supplement fund, as above described, be placed in the hands of the Treasurer of County School Funds and be handled by him under Section 94 of the School Code and as contemplated under Section 250 of the School Code?

"2. Has the Superintendent of Education any authority under the law anywhere in the School Code, implied or expressed, to place any funds raised by local taxation, county wide or district, or appropriated by the State, or contributed by persons, for the benefit of the schools, to his credit as Superintendent.

"3. Has the Superintendent of Education any authority to place any items on the pay roll which have not been approved and ordered placed on the pay roll by the County Board of Education, said action of the Board of Education being entered on the minutes of the County Board of Education? (See School Code, Section 93, 171 and 172.)

"4. Is there any authority for anyone except the County Treasurer of School Funds under the law to hold or dispose of any part of any funds collected for school purposes and contributed for school purposes except the incidental fees referred to in Section 182 of the School Code?

"5. By a local Act of the Legislature of 1923, (See Local Acts of Legislature, 1923, p. 80) the office of County Superintendent of Education of Butler County was made elective by the people, and the salary of said Superintendent of Education was fixed in the Act at not less than \$1,800.00 nor more than \$3,000.00 per annum, the particular amount of salary to be fixed by the County Board of Education of said County. The County Board of Education under the authority granted in this Act fixed the salary of the Superintendent of Education at \$3,000.00 per annum. In addition to the salary allowance as set forth in the Act, the County Board of Education, by an order spread upon the minutes of said Board, made a straight flat allowance to the Superintendent of Education of \$750.00 per year for expenses, payable monthly. In following such minutes the Superintendent of Education has placed his name on the pay roll each month for the amount of \$62.50, expenses, without any itemized or detailed account of any expenses incurred. Was there any authority, taking into consideration the Local Act referred to, for the County Board of Education to allow any other compensation to the County Superintendent of Education than that fixed by the Local Act? Was there any authority of law to allow the County Superintendent a fixed amount for expenses of \$750.00 per year? Was there any

authority of law for the County Board of Education of Butler County to allow to the Superintendent of Education, in addition to the \$750.00 allowance, an amount of \$877.50 to pay for him a personal car?"

In answer to your first question I desire to call your attention to Section 94 of the Alabama School Code, 1927, which provides that the County Board of Education shall select some suitable person to act as Treasurer of **all** the public school funds of the county, including funds for county high schools. He shall receive and take charge of **any money, funds, or proceeds** of any character, which may accrue to the county for public school purposes. He shall pay out all such monies upon written order of the County Board of Education, through its executive officer the County Superintendent, where such payment is **approved by the Chairman of the County Board of Education, in writing.**

In construing the above Section of the School Code it must be read in connection with Section 250 of the School Code in arriving at the purpose and intent of the Legislature in dealing with public school funds of the counties of this State. Section 250 dealing with expenditures of Local School Funds raised by taxation concludes as follows: "**And all funds contributed by persons or otherwise to any school or school district shall be applied as indicated in the grant for such contributors.**"

After a careful reading of these two sections of the 1927 School Code I am of the opinion that it was the clear purpose and intent of the Legislature to allow the County Board of Education to select a suitable person to act as Treasurer of all public school funds of the County. When this has been done he is required to receive and take charge of all money, funds, or proceeds of any character, which accrues to the County for public school purposes. Then the section provides that he shall pay out **all such monies upon the written order** of the County Board of Education, through its executive officer, the County Superintendent, where such payment is approved by the Chairman of the County Board of Education in writing. The funds referred to clearly means **all funds contributed by persons or otherwise to any school or school district.** These funds should therefore be collected by County Treasurer of School Funds and disbursed in strict accordance with Sections 94 and 250 of the School Code, 1927.

In answer to your second question, I am of the opinion that the County Superintendent of Education has no authority under the School Code, 1927, to place funds raised by local taxation, county-wide or district, or appropriated by the State, or contributed by persons, for the benefit of the schools to his credit. Such an act is contrary to the plain mandate of the law.

In answer to your third question I am of the opinion that the County Superintendent of Education is without authority to place any item on the pay roll which has not been approved and ordered placed on said roll by the County Board of Education and said action of the Board of Education must appear on the minutes of the County Board of Education. The pay roll must be prepared by the said Superintendent of Education in strict conformity with Sections 171 and 172, and in no event shall any money be paid out on any pay roll until Section 177 of the School Code of 1927, is strictly complied with. The Superintendent is liable for any money ordered expended by him otherwise.

In answer to your fourth question I am of the opinion the County Treasurer of school funds is the only person authorized to collect, hold or disburse public school funds of the County including funds for county high school. The only exception being "Incidental Fees" provided for in Section 182 of the School Code, 1927, and in the collection and disbursement of this fund the provisions of the statute should be strictly complied with.

In answer to your fifth question it is my opinion that the County Board of Education of Butler County cannot make any other allowance than for salary not to exceed \$3,000.00 per annum. House Bill 286, approved August 21, 1923 (Local Acts, 1923, page 80). I have examined this Act very carefully and I am unable to find any provision therein authorizing the payment to the County Superintendent of Education any sums of money other than the salary fixed by the County Board of Education within the limits set out in the Act above referred to. Further answering this question I refer you to an opinion rendered by me to you on June 16, 1928, and an opinion rendered to the Superintendent of Education of Monroe County, June 26, 1928, a copy of these two opinions are herewith enclosed with the request that you consider them in connection with this opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1929.

The Commissioner,
Department of Game and Fisheries,
Montgomery, Alabama.

Hunting on State Lands.

Opinion by The Attorney General.

Dear Sir:

I have your letter of December 14, 1928. You invite attention to Sections 4224, 4226 and 4227, Code of Alabama, 1923, and also to the Act approved Sept. 29, 1923, (General Acts 1923, p. 773), which Code Sections and Act relate to hunting on State lands.

You request my opinion:

"Will you kindly advise me whether in your opinion the Commissioner of Game and Fisheries has sole authority and full responsibility in the enforcement of laws and regulations with regard to hunting, killing, trapping, or otherwise taking protected wild animals and birds on lands mentioned herein, and whether or not any State official or employee or department of the State of Alabama has any authority or power under the laws of this State to regulate hunting, trapping, killing or otherwise taking protected wild animals or birds on lands herein mentioned, independently of the Commissioner of Game and Fisheries or concurrently with him?"

In answering your inquiry it is not necessary to construe the Code sections referred to by you for the reason that Chapter 146, Code of Alabama,

1923, of which said Sections are a part, properly forms no part of the Code. The whole of chapter 146, Code of Alabama, constitutes an Act approved Sept. 29, 1923, and the incorporation thereof in the Criminal Code adds no validity to the Act, which must, therefore, be construed as an Act. Furthermore, the Act adopting the Code, (Act approved August 17, 1923), clearly states in Section 3 thereof:

"No statute applying to * * * the Game and Fish Department of the State, or relating to such subjects, shall be repealed or affected in any manner by the adoption of this Code, or by the failure to incorporate such statutes as a part thereof."

So, to determine the powers, duties and functions of the Game and Fish Department and to ascertain these Acts that are made violations of the Game Laws, reference must be had, not to the Criminal Code of Alabama, but to the Acts of the Legislature.

By Section 40 of the Act, approved Sept. 29, 1923, supra, all lands belonging to the State of Alabama, whether held in fee or in trust by the State, are declared to be forest reserves and game refuges.

By Section 42 of said Act, it is made unlawful for any person to kill, hurt, trap, net or otherwise take, or to have in his possession, any of the wild animals or birds protected by the Laws of Alabama, upon any Alabama Forest Reserve or Game Refuge, "except under regulation of the Commissioner of Conservation."

Section 43 of said Act provides the penalty for violation of the last above mentioned matter.

By an Act approved Oct. 1, 1923, (General Acts, 1923, p. 795), the Commissioner of Conservation is made Commissioner of Game and Fisheries.

I find no other statute relating to the matter of hunting on State lands.

In my opinion, the Commissioner, Department of Game and Fisheries, is the only State official authorized to grant permits to hunt on State lands and even he cannot do so until he has promulgated the published regulations applying to the subject. The permit issued by said Commissioner in the manner stated, is not, of itself alone, sufficient authority for the holder thereof to enter upon State lands where trespassing thereon has been forbidden by proper authorities. The person holding the permit must obtain authority to trespass on such lands from the proper State official or Department charged with the possession or control of said lands where persons generally have been forbidden to trespass thereon.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 15, 1929.

Hon. R. E. Tidwell,
Superintendent of Education,
CAPITOL.

County Board of Education cannot appropriate public school funds to State Training School for Girls.

Board of Managers employs teachers for State Training School for Girls.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of December 21, 1928, in which you state that Act No. 565, (School Code, 1927, p. 312) provides an appropriation of \$330.00 per year for each inmate of the State Training School for Girls at Birmingham.

You request my opinion:

1. Can the County Board of Education legally appropriate public school funds for instruction of inmates of the State Training School for Girls at Birmingham?

2. Shall regularly licensed teachers under the direction of the County Board of Education of Jefferson County be employed for the State Training School for Girls at Birmingham?

In answer to your first question I am of the opinion that the County Board of Education cannot legally appropriate public school funds for the purpose of employing instructors for the inmates of the State Training School for Girls at Birmingham. The State Training School for Girls is in no way a part of the State or County public school system of Alabama but it is a penal institution and so treated by the Legislature in providing for its government and maintenance.

Legislative Act, page 65, approved September 9, 1927, (School Code, 1927, page 312) makes appropriations for the inmates of the State Training School for Girls. It was clearly the legislative intent that the Training School for Girls should be maintained from funds so appropriated in said Act.

In answer to your second question I am of the opinion that Section 658, School Code, 1927, provides for a Board of Managers of the State Training School for Girls and Section 660 of the same Code provides that the said Board of Managers shall have authority to employ such officers, agents, or employes as it may deem necessary or expedient. This clearly carries with it the power of said Board to employ teachers for said Institution when deemed expedient by said Board and that the Board is the sole judge of the qualifications of its employees and teachers should they desire to employ same. Section 660 of the School Code is entirely silent as to the qualifications of any agent, employee of said State Training School for Girls.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 15, 1929.

The Sheriff,
Andalusia, Covington County, Alabama.

Sheriffs fees charged against fine and forfeiture funds of county when court enters a nolle prosequi. Sheriffs fees not a charge against fine and forfeiture funds of county where indictment is found by grand jury, and case is transferred by order of the court to a juvenile court.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your letter of November 21, 1928, has been received in which you request the opinion of the Attorney General on the following questions:

1st. Can you as sheriff charge your costs in criminal cases appealed from the Probate Court to the Circuit Court and which are afterwards dismissed from the docket of the Circuit Court against the fine and forfeiture of the county.

2nd. Can you as sheriff charge your costs in cases where indictments were returned by the grand jury in the Circuit Court, and it developed after indictment that the persons so indicted were juvenile offenders and the cases were transferred to the juvenile court, against the fine and forfeiture funds of the county.

In answer to your first question I presume that when you use the word "dismissed" you mean that the cases were nolle prossed. If that be the case I am of the opinion that your fees are a charge against the fine and forfeiture fund of the county as provided by Section 4039, Code of Alabama, 1923, as amended by the Act approved Feb. 18, 1927 (General Acts 1927, page 45), Where a case is dismissed there is no provision for costs against the fine and forfeiture fund.

Opinion of Attorney General, Book 4, (Office Edition) p. 28.

In answer to your second question I am unable to find any provision of law making such costs a charge against the fine and forfeiture funds of the county. The above quoted section does not cover costs where cases are transferred from the Circuit Court to a Juvenile Court.

Opinion Attorney General, July 18, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 15, 1929

The State Tax Commission,
CAPITOL.

Gentlemen:

Attention Mr. Mooring.

Slot devices on hotel toilets not subject to license tax.

Opinion by Assistant Attorney General Koonce:

I have your letter of August 29, 1928, in which you refer to the decision of the Court of Appeals in the case of the State v. New Florence Operating

Company, 95 So. 913. You state that the Court bases its decision in this case on the fact that a slot machine attached to a hotel toilet is not subject to a license because the machine is attached to the realty and therefore becomes a part of the realty.

You request my opinion:

Shall we accept the decision referred to above as final or shall we institute proceedings for the collection of this license from the hotels throughout the State?

In my opinion the slot devices on hotel toilets are not slot machines within the contemplation of Schedule 73, Revenue Acts of 1919, (General Acts 1919, page 423).

I have examined the decision of the court in the above case and I find that it contains the statement that the value of the device sought to be taxed is \$12.50. The decision also states that the device in question is attached to the realty and taxed as a part of the realty. The court also takes the view that it is difficult for the court to come to the conclusion that the Legislature intended to impose a license of \$15.00 on a device which has a value of \$12.50. I do not agree with the reasoning of the court. What it says would be true had it been dealing with ad valorem tax instead of with a license. Ad valorem tax is based on the value of the property sought to be taxed but a license such as the one referred to above is based on the use, to which the property is put.

As I have just stated above I do not agree with the court in the reasoning used in the above case. However, in my opinion the device in question is not subject to a license, it is not a slot machine such as the Legislature had in mind and not operated for profit but is operated for the convenience of the public.

Your attention is invited to an opinion dated April 27, 1928, (Vol. 5, p. 165 Office Edition), to the State Tax Commission in which I held that a slot device in a telephone pay station is not subject to such a license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 16, 1929.

Hon. J. P. Lipscomb,
Notary Public, Ex officio Justice of Peace,
Laceys Springs, Alabama.

When the commission of a Notary Public, Ex officio Justice of Peace expires.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 12, 1929, in which you request my opinion as to the time when your commission as Notary Public and Ex officio Justice of the Peace expires.

You state that you were appointed by the Governor March 17, 1927. Section 9251, Code of Alabama, 1923, regulates this and is as follows:

"Appointment and term of office.—The Governor may appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, as defined by law, shall have and exercise the same jurisdiction, and the same powers, as justices of the peace, within the precinct or ward for which he is appointed; and shall hold office for the term of four years from the first Monday after the second Tuesday in January 1911, and every four years thereafter."

You will note from the above quoted section that a Notary Public with the powers of Justice of the Peace has a fixed term of office. The above section provides among other things "* * * and shall hold office for the term of four years from the first Monday after the second Tuesday in January 1911, and every four years thereafter."

If you were appointed by the Governor on the 17th day of March, 1927 you were appointed to serve the remaining term which began on the first Monday after the second Tuesday in January, 1927, and this term being for four years will expire on the first Monday after the second Tuesday in January 1931.

Carey vs. State, 76 Ala. 78.

Opinion of Attorney General rendered to J. L. Hackworth, Feb. 8, 1927.

Also Opinion of Attorney General rendered to S. J. Stearns, Feb. 12, 1927.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 16, 1929.

The Superintendent of Banks,
Banking Department,
CAPITOL.

No tax or fee required for increasing capital stock of Building and Loan Association.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of December 19th is acknowledged. You wish my opinion as to what tax or fee, if any, is required of Building and Loan Associations in increasing their capital stock.

In reply will say that building and loan associations organized since August 26, 1927, in accordance with Act No. 375, approved on said day (Acts 1927, page 431, et seq.) do not need to have any proceedings for increasing their capital stock. Under the provisions of Section 1 of said Act amending Section 7097 of the Code of Alabama, 1923, "the amount of capital

stock subscribed and the amount of cash paid in thereon shall not be less than five thousand dollars." Otherwise than above stated, "the amount of the capital stock shall be unlimited."

Building and Loan Associations organized prior to the approval of said Act No. 375 must increase their capital stock as provided in section 7100 of the Code, 1923. Section 6972 of the Code which governs for increasing the capital stock of ordinary business corporations, in my opinion, does not apply to Building and Loan Associations, since the method of increasing their capital stock is specifically provided for by section 7100 of the Code, 1923. I find no provision of law requiring any tax or fee for increasing the capital stock of a Building and Loan Association.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 17, 1929.

The Superintendent,
Bureau of Insurance
Montgomery, Alabama.

Dear Sir:

Article 10 of Chapter 206, Code 1923, has no application to corporations whose sole business is guaranteeing titles to land.

Opinion by Assistant Attorney General Evans.

In the opinion given out by this office to you on August 17, 1928, it was held that a foreign title guaranty corporation doing business in the State, must comply with Sections 8514, 8515, 8516 and 8517 of the Code, 1923.

On a more careful examination of the Code we find that Article 16 of Chapter 274 of the Code, 1923, was not part of the Code as adopted by Act No. 160, approved August 17, 1923, (Acts 1923, p. 127); but was Act No. 485, approved Sept. 29, 1923 (Acts 1923, p. 635 et seq.) It was passed after the adoption of the Code and is not to be considered as merely *in pari materia* with other parts of the Code upon the same subject. It must be given full force and effect, and where it legislates fully on a matter it must supersede what is in the Code, as adopted, upon the same subject. Said Article 16 was placed in the printed Code by virtue of Section 4 of said Act No. 160. Such being the case, Article 10 of Chapter 206 has no application to a corporation whether foreign or domestic, whose sole business in Alabama is issuing guaranties of title to land. Such corporations must, instead of complying with the provisions of said Article 10 of Chapter 206, comply with the provisions of Act No. 160, or, what is the same thing, with said Article 16 of Chapter 274 of the Code.

The opinion of August 17, 1928, is overruled.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 17, 1929.

Judge of Probate,
Andalusia, Covington County, Alabama.

Clerk of County Court of Commissioners is County officer—County required to pay premium on bond of.

Notary Public—Surety bond not required.

County not authorized to pay premiums on Notary Public's bond.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 12, 1929, in which you request the opinion of the Attorney General upon the following legal questions:

1st. Under Local Acts of the Legislature, 1919, Section 9, page 10, will the Clerk of the Court of County Commissioners and the County Treasurer for Covington County have to make a bond in a Surety Company, and is the premium on said bonds a legal charge against the County?

2nd. Is it the duty of the Court of County Commissioners to fix the bond of the County Treasurer?

3rd. Does a Notary Public appointed in Covington County have to make bond in a Surety Company, and if so is the premium on said bond a legal charge against the County?

In answer to your first question I am of the opinion that under Section 9, Local Acts 1919, page 10, there is made provision for the appointment of a Clerk of the Court of County Commissioners, the compensation he is to receive, and that the Clerk enters upon the discharge of his duties he shall enter into bond payable to the State of Alabama for the benefit of Covington County, to be approved by the President of said Court in the sum of \$1,000.00, and filed and recorded in the office of the Judge of Probate of said County. The Act is silent as to whether or not the bond should be made by a surety company, and makes no provision for the county paying the premium. However, under the authority contained in Section 2658, Code of Alabama, 1923, the bond of all county officers shall be made by some surety or guaranty company, and it is provided that the premiums on said bonds are payable out of the County Treasury. The Clerk provided for in the above referred to Act is a County officer and the premium on his bond should be paid for out of the County Treasury.

See Opinion of Attorney General, Dec. 21, 1928, to A. P. Henderson, County Engineer, Limestone County, Athens, Alabama.

In answer to your second question I am of the opinion the Local Act referred to above contains no provision for the appointment of a County Treasurer by the Court of County Commissioners. If there is no Local Act creating the office of County Treasurer in Covington County, and Covington County having a population of less than fifty-five thousand inhabitants according to the last Federal Census taken in 1920, it would have no County

Treasurer, but would have a county depository as provided for in Article 2 of the Code of Alabama, 1923, page 576, and all the terms of said Article would be applicable to Covington County.

In answer to your third question I am of the opinion that under Section 9241 of the Code of Alabama, 1923, a Notary Public must give bond with sureties in the sum of \$1,000.00 to be approved by the Judge of Probate of the County for which they are appointed. The statute does not require a surety bond and the County is not authorized to pay the premium on the bond. A Notary Public is not a county officer as provided in Section 2658 of the Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 17, 1929.

Circuit Clerk,
Camden, Wilcox County, Alabama.

State liable for court costs in civil actions. Execution cannot issue against the State—no appropriation to pay costs.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 10, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not the State of Alabama is required to pay court costs in civil cases, where the State is plaintiff and is unsuccessful in the case.

I am of the opinion that under Section 7221 of the Code of Alabama, 1923, where the State of Alabama is party plaintiff in civil cases and is unsuccessful in the case, it is liable for court costs just as in the case of individual suitors. However, in case of the State no execution could be levied against any State property to satisfy the judgment for costs, and I know of no funds appropriated by the Legislature for the payment of such items of costs under facts set forth in your letter.

Yours truly,
CHARLIE C. McCALL,
Attorney General

January 17, 1929.

Circuit Clerk,
Center, Cherokee County, Alabama.

Clerks fees for making transcript on appeal by defendant to Court of Appeals where case is reversed, claim against fine and forfeiture funds of county, under Act of Legislature, 1927, page 45, amending Section 4039 of the Code, 1923.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 26, 1928, in which you state as follows:

The defendant was convicted in the Circuit Court of Cherokee County upon the charges of bastardy. He appealed to the Court of Appeals. The case was reversed and remanded by the Court of Appeals.

Upon this statement of facts you request my opinion on the following question of law:

Is the clerk's fee for making the transcript for the Court of Appeals a proper charge against the defendant?

I am of the opinion that the making of the transcript was at the instance of the defendant on his appeal, and the case was reversed and remanded and he is therefore not liable for this item of costs. However, you as Clerk under Section 4039, Code of Alabama, 1923, as amended by Section 1, of an Act approved Feb. 18, 1927 (General Acts, 1927, p. 45) may file your claims against the fine and forfeiture fund of Cherokee County. Section 4039 as amended provides in part as follows:

"This section shall be held to apply to all fees of officers of the trial court arising on an appeal by the defendant to the Supreme Court or the Court of Appeals of Alabama, in cases where the judgment of the trial court is reversed and a new trial allowed, or the defendant ordered discharged."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 17, 1929.

Hon. Woolsey Finnell,
Alabama Director of Highways,
CAPITOL.

The State Highway Department is without authority to pay to a town or city money for the construction of pavement of one of its streets constituting part of the State Highway system, except when constructed under contract as provided by statute.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of December 7, 1928, is acknowledged. You ask that this office approve the payment by the Highway Department to the

Town of Ozark the sum of Twenty-seven Hundred Dollars, or thereabout, under the following facts:

On August 25, 1927, the Highway Department of Alabama let a contract for grading the public highway between Ozark and Enterprise. Daleville Street in the Town of Ozark constituted part of this project. This road, after being graded, needed to be graveled. The Town of Ozark made the State Highway Department a verbal proposition that, if the Highway Department would give the Town of Ozark the cost of the gravel needed for said Daleville Street, the Town of Ozark would pave Daleville Street. The Town of Ozark was told by said Highway Department to make its proposition in writing. This it did not do. Without further understanding or action upon the part of the Highway Commission, the Town of Ozark paved the street and made it unnecessary for the Highway Department to have that part of said highway gravelled, thereby saving the said Highway Department substantially Twenty-seven Hundred Dollars.

The existence of the Highway Department is statutory. All its power and authority must be found in the words of the statutes or be reasonably inferred therefrom. When the method of doing a particular thing by it is provided by statute, that method is exclusive unless otherwise provided by statute. I find no authority granted by statute to the State Highway Department to pay for the construction of a highway, except where such highway has been constructed under contract made in the manner provided by the statute. Section 27 of the Highway Code of Alabama, approved August 23, 1927, reads as follows:

"The State Highway Department may enter into contracts with any of the counties of the state, or with any of the municipalities of this state as it may with individuals, firms or private corporations, to do any work in the construction, repair or maintenance of the roads, bridges or highways of this state."

Section 30 of said Code provides:

"Every contract for road or bridge construction, repair or maintenance under the provisions of this article shall be made in the name of the State of Alabama, approved by the State Highway Department and the Highway Director of the State Highway Commission, and the Governor."

Section 33 of said Code provides:

"No contract for construction, repair or renewals of highways, bridges, or culverts shall be let without approval of the Governor, etc."

From the statement of facts it clearly appears, that no contract for the pavement in question was made by the State Highway Department with the City of Ozark. Such contract could be made in the manner provided by statute only. There is no liability in law upon the State Highway Department for such payment. To pay for such services, rendered without contract, after services have been rendered, would, in my opinion, be in violation of Section 68 of the Constitution of Alabama; to pay for such services, under such circumstances would also be in violation of Section 72, of said Constitution as there is no provision of law providing for such payment, there is, conse-

quently, no appropriation made by law by which such money can be withdrawn from the State Treasury. There being no authority in law for the State Highway Department to incur a legal liability under the fact stated there can be no authority in law for the payment of such a claim. In contemplation of law it would be nothing more or less than a gift.

The State Highway Department is not authorized to make gifts of the money provided for the construction of highways.

Opinion of Attorney General to State Highway Department, Sept. 13, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 18, 1929.

Clerk Circuit Court,
Camden, Wilcox County, Alabama.

Circuit Court Clerk may not legally hold said office and at same time act as Notary Public and Ex officio Justice of Peace.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of December 19th, 1928.

You request my opinion:

Can a Circuit Court Clerk legally serve as a notary public and ex-officio justice of the peace at one and the same time?

In answer to your inquiry it is my opinion that a clerk of the circuit court may not legally serve as a notary public **ex officio justice of the peace**.

Section 280 of the Constitution of Alabama provides that no person shall hold two offices of profit under this State, except justices of the peace, constables, notaries public, and commissioner of deeds.

Section 2575 provides that no person shall hold two offices of profit under this State, except notaries public.

The offices of clerk of the circuit court and justice of the peace are both offices of profit.

An ex-officio justice of the peace has the jurisdiction of a justice of the peace in his precinct. Therefore, an ex officio justice of the peace falls within the inhibition of Section 2575 referred to above.

"It is true that the **constitution**, section 280, does not prohibit a justice of the peace holding two offices of profit at the same time. However, Section 2575 of the Code of 1923 provides that no person shall hold two offices of profit at one and the same time under this State, except **Notaries Public**. This provision of statute is tantamount to a direct prohibition against a justice of the peace or any other officer except notaries public holding two offices of profit at the same time."

"The Constitution of this State is only a limitation upon the power of the legislature to enact laws. Unless that power is restricted by the Constitution the legislature may enact such laws as it sees fit. The constitution does not by Section 280 prohibit a further restriction, by the legislature, of the qualification of office holders."

Opinion of Attorney General 1928, Vol. 5, page 7.
Shepherd v. Sartain, 185 Ala. 439.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 18, 1929.

Hon. C. F. Dodson,
Chairman, Board of Registrars,
Heflin, Cleburne County, Alabama.

Right of person leaving the State of Alabama to vote in this State.

Opinion by Attorney General McCall.

Dear Sir:

I have your letter of January 7, 1929, in which you state that certain parties who have been out of the county for eight or ten years and who have no property or interests in the county, continue to vote there.

You request my opinion:

Are such persons entitled to continue to vote in your county?

It is my opinion that when a person moves from one county to another or when he moves from this state to another state to take up his residence at the place to which he moves, he automatically loses his citizenship in Alabama, and if an election were held in Alabama the next day after his removal he would not be entitled to vote here. It is a question of citizenship **based on intent**.

To be a citizen of a state one must live and have his permanent abode in that state. It is true that under Section 366, Code of Alabama, 1923, one does not lose his residence by temporary absence from the state or county. In other words if he is absent from his county or state with the intention of returning and with no intention of taking up his permanent residence in another county, country or state, then he would not lose his citizenship or his right to vote, but when he leaves his county or state going to another, engages in business, moves his family, if he has one, and establishes his domicile in another county, state or country, then this should abandon his right to vote in any election in Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 18, 1929.

Register, Circuit Court,
Jefferson County,
Birmingham, Alabama.

How cost is paid when State fails in an attempt to condemn vehicle.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 31, 1928. You request my opinion on the following items:

"An automobile was condemned under Section 4776 et seq Code of 1923, Vol. 2, and ordered sold. It was sold for a sum greatly less than the costs and expenses of keeping this automobile. On confirming the sale the Court taxed the State with the difference between the sale price and the accrued costs under Section 4785.

"In certifying such cases to the State Auditor what form of certificate should be used? Does this Section give the Court the right to make such a decree?"

It is my opinion that the Judge was without authority, in his decree confirming the sale above referred to, to include in the same a provision taxing the State with balance of the cost due after giving credit for the amount the condemned automobile brought at sale. The State pays costs in these proceedings, under authority of Section 4785, Code of Alabama, 1923, and no other. This Section is as follows:

"Payment of costs when decree rendered against state.—In all cases filed under this article for the purpose of condemning and selling conveyances and vehicles of transportation of any kind on account of their use in the transportation of prohibited liquors or beverages, if a decree shall be rendered against the state the court costs shall be paid out of the law enforcement fund provided for in this article, said payment to be made on warrant of the auditor, upon receipt by the auditor of the bill of costs certified as being correct by the register of the circuit court in which such case shall have been tried, which cost bill should also bear the approval of the attorney general and the governor before warrant shall be drawn."

You will note that among other things the above statute provides:

"If a decree shall be rendered against the state the court costs shall be paid, etc. * * *"

This clearly refers to the original decree upon the merits of the case and not to any decree the judge might render in confirming the sale.

It is my opinion that the State Auditor would not be protected in paying any costs under the decree you mention. In other words it is plain from the provisions of the above quoted statute that the State must fail in its original case of condemnation before costs can be claimed under Section 4785, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 18, 1929.

The State Auditor,
State Capitol,
Montgomery, Alabama.

Educational appropriations: Unexpended balances of appropriation for Educational purposes become a trust fund for such purposes and should be carried forward as such from year to year and do **not** revert to the general funds of the State Treasury.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of recent date.

You inquire whether or not the unexpended balances of annual appropriations from the Alabama Special Educational Trust Fund are to be charged to the General Fund or whether or not only the excess of expenditures over receipts for this fund should be so charged and whether or not the unexpended balances of appropriations should be charged to the general fund and carried forward from year to year.

It is my opinion the unexpended balances of appropriations made by the Legislature for Educational purposes should be carried from year to year as a special fund.

Should the sources of revenue which are devoted to educational purposes, or the Alabama Special Educational Trust Fund, fail to satisfy the **appropriations** made for Educational purposes then the general fund in the State Treasury must supply the **difference**.

Section 31 of an Act approved August 25, 1927, (General Acts, 1927, p. 455).

In each instance where an appropriation is made by the Act above referred to, the appropriation becomes a trust fund for the purpose of the appropriation. It is merely a matter of mathematics as to how much of the general fund of the State shall be applied to satisfy the appropriation. First, those funds provided by Section 2-k of an Act approved July 22nd, 1927, (General Act 1927, p. 139-148) must be applied to the appropriation, if such funds are insufficient the general fund of the State must make up the balance. The money derived from the sources of revenue set aside for the purpose by the Act last above referred to and so much of the general fund as may be necessary, together comprise a special trust fund.

It is provided that the unexpended balances of **appropriations** made for Educational purposes shall be carried forward from year to year, or, as I have hereinbefore said, constitute a special trust fund for the specific purpose for which the appropriation was made.

Section 252, School Code, 1927.

The provision of the Code of 1923 to the effect that all funds shall revert to the general fund under certain conditions, except certain funds, of which excepted funds are the educational funds, is indicative of the correctness of this ruling.

Section 850, Code, 1923.

Obviously, when it is ascertained how much of the general fund is necessary to aid in making up the appropriation that amount leaves the general fund never to return.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 18, 1929.

Probate Judge,
Evergreen, Conecuh County, Alabama.
Attention: Mr. J. J. Lee.

License: Person is not liable for peddlers license where his transactions are in interstate commerce.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of recent date.

You inquire whether or not one is liable for a peddlers' license who takes orders for toilet articles, extracts, etc., and mails the orders to a concern without this State and receives the goods from such concern for delivery to the purchaser, in the instant case the consumer, and collects for the same upon delivery.

Such person so engaged can not be required to procure a peddlers' license. The transaction is in interstate commerce.

There is no distinguishable difference, in the principle involved in the instant case and the cases of Clarke vs. State and Miller vs. State in which the Court of Appeals of this State followed the Dozier case by the United States Supreme Court, 218 U. S. 124, 54 L.Ed. 965.

McCarter vs. City of Florence, 213 Ala. 367.

Clark vs. State, 4 Ala. App. 202.

Miller vs. State, 7 Ala. App. 183.

The courts, in the authorities mentioned supra, held that the acts of the defendants in selling and delivering constituted interstate commerce.

Crenshaw vs. Arkansas, 227 U. S. 389.

This office has previously held that such acts as outlined by you were in interstate commerce.

Opinion Attorney General, May 21, 1928, to Judge of Probate, Dallas County

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 21, 1929.

State Tax Commission,
CAPITOL.

Attention: Mr. John S. Mooring.

Only State owned cars which are used by the Highway Department are exempt from license and taxes

Opinion by Assistant Attorney General Haynes.

Gentlemen:

I have your letter of October 15, 1928, in which you request my opinion on the following matter:

"1. The meaning which shall be attached to the word 'officials'. Does this mean that only the motor vehicles used by members of the Highway Commission are included in the word 'officials' or is the word broad enough to cover all employees of the Highway Commission?

"2. If a motor vehicle is used by an 'official' of the Highway Department, would it be exempt from license if used partly for the individual use of such official or would the exemption apply only when used exclusively in the business of the State Highway Department?

"3. When motor vehicles belonging to individuals become exempt under this provision would such exemption from license operate to exempt such vehicles from ad valorem taxation? The only method provided by law for the ad valorem taxation of motor vehicles is on the application for license, and, of course, vehicles which are exempt from license do not make this application and would apparently, therefore, be exempt from ad valorem taxation unless there is some method of taxing such vehicles of which we do not have knowledge."

In answering the three above inquiries I will not attempt to answer them separately but will consider them together.

I am of the opinion that where the statute says "motor vehicles used by the State Highway Department, its officials, or engineers * * *" it refers only to cars owned by the State and used by the State Highway Department in connection with State Highway business by its officials and engineers.

The statute under consideration is Section 13 of an Act approved August 30, 1927, (General Acts, 1927, page 352). This Section is as follows:

"Motor Vehicles of Highway Department Exempt from license. Motor vehicles used by the state highway department, its officials or engineers, shall not be subject to any state, county or municipal license."

The above Section does not refer to privately owned cars used by officials and employees sometime for official business and sometime for private use. It must be a State owned car which has been designated for use of and by the State Highway Department, in which event it is not subject to a license and consequently is not subject to ad valorem tax, as the only method by which a motor vehicle can be taxed is when application is made for a license, and before this license is issued the owner of the vehicle must present to the

Probate Judge a statement from the Tax Collector that all taxes due on said car have been paid. Therefore, if no license is required then no property tax can be demanded.

It was not the intention of the Legislature in passing Section 13, *supra*, to permit privately owned cars of officials and engineers of the Highway Department that are sometimes used in connection with the business of the Department but more frequently for private purposes to escape taxation.

For a motor vehicle to come under the provisions of Section 13, *supra*, it must be a **State owned** car and used exclusively by the Highway Department, its officials or engineers in the transaction of the business of the Highway Department.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 21, 1929.

The Sheriff,
Chatom, Washington County, Alabama.

Carrying concealed weapons.

Carrying pistol on premises of another.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of November 30, 1928. You state that in searching for liquor cars recently you stopped a car which had a pistol sticking down by the cushion of the seat. You also state that the car containing the pistol was on a detour just off the highway at the time you found the pistol.

You request my opinion:

If a pistol is found in an automobile which has left the main highway and is traveling a detour should the owner of the pistol be prosecuted for carrying a pistol on premises not his own or under his control?

In my opinion the owner of the pistol referred to above did not violate the law by having the pistol in his automobile while he was traveling the highway or a detour because the law prohibiting the carrying of a pistol in the premises of another does not prohibit the carrying of a pistol on a public highway, unless the pistol is concealed about the person.

Section 3485, Code 1923, provides that any person who carries concealed about his person a bowie knife, or knife or instrument of like kind or description, or a pistol or firearm of any kind, or an airgun shall be subject to prosecution.

The Supreme Court of Alabama has rendered decisions in which it stated what is necessary to constitute the offense of carrying a pistol concealed about the person.

In the case of *Ladd v. State*, 9 So. 401, the defendant was charged with carrying a pistol concealed about his person. There was evidence tend-

ing to show that the defendant had the pistol under a sheep skin rug in the bottom of the buggy in which the defendant was riding. The opinion of the court contains the following:

"While it is not necessary to a conviction that the pistol was carried on the person, yet it must have been so connected therewith that the locomotion of the body carried with it the weapon as concealed. When one's weapon is in a vehicle in which he is riding and not attached to his person at all, it cannot be said to be concealed about his person, within the sense of the statute. *Cunningham v. State*, 76 Ala. 88. In *Diffey v. State*, 86 Ala. 66, 5 South. Rep. 576, the proof was that the pistol was concealed in a hand basket, which the defendant carried in his hand or on his arm. There the concealed weapon accompanied the defendant in his movements, the same as if it had been in his coat pocket."

In the case of *Warren v. State*, 10 So. 838, the defendant was convicted of carrying a weapon concealed about his person. The evidence showed that the defendant carried the pistol in a small hand satchel, which was supported and carried by means of a strap which passed over his shoulder. The court held that the pistol was carried about the person in the sense of moving with the person.

You will observe from the above opinions that if a person carries a pistol or other weapon mentioned in Section 3485, Code 1923, and that if such pistol or other weapon is concealed about the person so that it accompanies the body in its movements the same as if carried in the clothing of the defendant then he is guilty of carrying a weapon concealed about his person.

Section 3487, Code 1923 provides that no person shall carry a pistol about his person on premises not his own or under his control and said section provides that it shall not apply to sheriffs and other enumerated officers.

The Supreme Court of Alabama has interpreted the above section 3487 as prohibiting the carrying of a pistol on the premises of another, but that it does not prohibit the carrying of a pistol on a public highway or other public property, provided such pistol be not concealed:

Isaiah v. State, 58 So. 53.

Norton v. State, 65 So. 689,

Hamilton v. State, 116 So. 340.

I rendered an opinion to you on August 12, 1927, (Vol. 3 op. Atty. Gen. page 33) in which I held that if a pistol was found under the back seat of an automobile which was not on the public highway or other public property that this would subject the owner of the pistol to prosecution. After a careful reconsideration of the matter I have reached the conclusion that said opinion was erroneous. Carrying a pistol under the back seat of an automobile does not constitute the carrying of a concealed pistol about the person, as contemplated by section 3485 Code 1923 neither does it constitute "Carrying about the person" as contemplated by section 3487, Code 1923. I hereby recall said opinion of August 12, 1927 rendered to you.

See the following cases:

Paulk v. State, 261 S. W. 779, (Texas)

Welch v. State, 262 S. W. 485, (Texas)

Armstrong v. State, 265 S. W. 701, (Texas)

I rendered an opinion to the Judge of Probate of Bibb County on June 15, 1928, (Vol. 6, op. Atty Gen. page 94) in which I held that if a person has a pistol in his hand and stops on the premises of another he violates the law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 23, 1929.

Hon. J. G. Ussery,
Justice of the Peace,
Cottondale, Tuscaloosa County, Alabama.

Blanks furnished Justice of the Peace.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 17, 1928, in which you state that you are a justice of the peace for precinct 15, Tuscaloosa County.

You request my opinion:

Is it the duty of the county to furnish me free of charge blanks and a docket for use in my court?

I am of the opinion that it is the duty of the Judge of Probate of your county under section 8793 Code of Alabama 1923 to furnish you with necessary blanks to be used in connection with your office.

Section 8793 supra is as follows:

"Blanks furnished justice of the peace by probate judges.—Judges of probate shall furnish the necessary blanks to justices of the peace, notaries public, and ex officio justices of the peace and constables in their respective counties, that are required to transact business in their respective courts and report the cost of same to the commissioners' court or board of revenue in their respective counties for settlement."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 23, 1929.

Hon. O. D. Jackson,
Federal Prohibition Administrator,
New Orleans, La.

License tax on automobiles: Government owned cars operated in enforcement of Federal Prohibition law not required to pay state license.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of recent date. You inquire whether or not a motor vehicle used by a federal official for official

business in the enforcement of the prohibition law is subject to the license tax. You fail to state whether or not such vehicle is owned by the government or by an individual.

If the vehicle is owned by the government and used in official business it is not subject to a license tax.

Pan Handle Oil Co. vs. State of Miss., 48 Sup. Ct. Rep. 451.

On the other hand if the vehicle is owned by an individual such person is liable for the license tax imposed by the State.

Opinion Attorney General, Feb. 9, 1927, to Capt. T. E. Guy.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 23, 1929.

Hon. Willard McCall,
Special Assistant Attorney General,
Bankers Bond Building,
Birmingham, Alabama.

Foreign Corporations; must pay corporation permit fee annually on amount of capital employed at time each permit is issued by Secretary of State.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of June 11, 1928, requesting the opinion of the Attorney General on the following question of law:

Where a foreign corporation who pays a corporation permit fee as provided in Section 42 of the revenue law of 1927, (Acts, Legislature 1927, p. 171) on the amount of \$10,000.00 capital employed in this State, and thereafter increases its capital employed in this State, should it then be required to pay an additional fee.

I am of the opinion that under the above quoted Act, a foreign corporation doing business in this State should pay for a corporation permit in accordance with the schedule set out in the Act, according to the amount of capital employed in this State at the time it applies to the Secretary of State for said permit. The permit is based on the amount of capital employed at the time application is made and annually thereafter.

Where a permit is issued by a corporation based on the amount of \$10,000.00 being the capital employed in this State and a permit issued, and thereafter the amount of capital employed is increased, the corporation would have to pay on the increased capital employed when it obtains its next annual corporation permit from the Secretary of State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 23, 1929.

Hon. Willard McCall,
Special Assistant Attorney General,
Bankers Bond Bldg.,
Birmingham, Alabama.

Capital actually employed in corporation permit statute—defined.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of September 10, 1928, in which you request the opinion of the Attorney General in response to a letter addressed to you from Hon. Daniel W. Troy, of Montgomery, Alabama, on the following question of law:

What is meant by the term "capital employed in Alabama" in the corporation permit statute?

In answer to your question I have only to quote the definition given by the Supreme Court of Alabama in the case of *State et al v. Burchfield Bros*, 211 Ala. 6. 32, which is as follows:

"The words (capital actually employed) were used in subsection (d), Section 5, of the statute supra, in their natural and ordinary signification and in the generally accepted sense. They have application to all of the properties and money set apart from other used and invested or employed in the operation of the business with a view to income or profit therefrom."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 25, 1929.

Chief Examiner of Accounts,
Department of Examiners of Accounts,
CAPITOL.

Office holders: Members of Courts of County Commissioners are not entitled to receive increased compensation during their term of office.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 22, 1929, in which you state as follows:

There were two members of the Court of County Commissioners of Bullock County elected in the general election 1926, and who went into office on the first Monday after the second Tuesday in January, 1927, for a term of four years, their term of office expiring on the first Monday after the second Tuesday in January, 1931, that at the time they assumed office their compensation was fixed at four dollars per day. That

on September 6, 1927, the Legislature of Alabama 1927, passed a local act for Bullock County in which the compensation of members of County Commissioners was made six dollars per day instead of four dollars per day. (Local Acts, Legislature 1927, p. 302).

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Can the two members of the Court of County Commissioners who took office on the first Monday after the second Tuesday in January, 1927, whose term would expire on the first Monday after the second Tuesday in January 1931, receive the raise in compensation provided for in said local Act during term of office.

I am of the opinion the incumbents of these offices cannot take advantage of the increase in compensation as provided under the Local Act of the Legislature, 1927, page 302, by reason of the prohibition in Section 281 of the Constitution of 1901, which provides that "The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall be not increased or diminished during the term for which he shall have been elected or appointed."

Biennial Report of the Attorney General, 1918-1920, page 560.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 25, 1929.

The President,
County Board of Revenue,
Anniston, Calhoun County, Alabama.

1. County Board of Education—Payment for annual report.
2. County Superintendent of Education—Payment for envelopes.
3. Telephones—Long distance calls by County Superintendent of Education—Payment for.

Opinion by Attorney General.

Dear Sir:

I have received a letter dated January 16, 1929, from Mr. R. B. Jones, Attorney at Law, Anniston, Alabama, stating that the Board of Revenue has requested him to secure a ruling from this office on the questions set forth below. The request for this opinion should come from a member of the Board of Revenue, (Sections 868, 869, Code of Alabama, 1923). However, inasmuch as I have received a number of requests from other officials there connected with this matter I shall answer them all in this one opinion.

You request my opinion:

"1st. Is the County of Calhoun, through its Board of Revenue, liable for the payment of the bill for printing the annual report or

catalogue prepared by the Board of Education, copy of which is herewith enclosed.

"2nd. Is Calhoun County, through its Board of Revenue, liable for the payment of the bill for the engraving or art work in said report or catalogue?

"3rd. Is the County of Calhoun, through its Board of Revenue, liable for the payment for envelopes for the mailing out of said report or catalogue.

"4th. Is the County of Calhoun liable for the payment of long distance telephone calls by the County Superintendent of Education and members of the Board of Education?"

In answer to your first question will state that the County Board of Revenue is not liable for payment for printing of the annual report or catalogue of the County Board of Education. The payment for printing must be paid for by the County Board of Education out of the county three mill tax or bonus fund. The County Board of Revenue is liable for payment for the paper on which the report is printed.

In answer to your second question will state that the County Board of Revenue is not liable for payment of the bill for engraving or art work in said report or catalogue. This should be paid for by the County Board of Education out of the county three mill tax or bonus fund.

In answer to your third question will state that the County Board of Revenue should pay for the envelopes to be used in mailing out said reports or catalogues.

In answer to your fourth question, I am of the opinion that it is the duty of the County Board of Revenue to furnish the County Superintendent of Education with a telephone and that it should pay for all long distance calls by the office of the County Superintendent of Education over said telephone where said calls are strictly on official business and where the claims are properly itemized and presented for payment.

I call your attention to Section 169, Alabama School Code, 1927, and enclosed herewith hand you copy of an opinion to the Probate Judge of Clay County, Alabama, dated June 1, 1928, which deals fully with the subject of telephones for various offices.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 26, 1929.

The Commissioner,
Department of Agriculture and Industries,
CAPITOL.

Fines, disposition of arising from violations of provisions of Agricultural Code of Alabama, 1927.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 16, 1929. You state that under Section 1, Article 43, Agricultural Code of 1923, the net proceeds of fines imposed for violations of provisions of the Agricultural Code were paid to the Commissioner of Agriculture and Industries.

You request my opinion:

Are the fines arising from the violations of the provisions of the Agricultural Code of Alabama, 1927, to be paid to the Department of Agriculture and Industries, and deposited to the credit of the Agricultural Fund?

In answer to your inquiry, I advise you that said fines, which are the subject of your inquiry, can legally be paid into the Agricultural Fund, only where there is an express authorization of law therefor.

Funds arising from fines which are provided for in the following sections of the Agricultural Code of Alabama, 1927, should be deposited to the credit of the Agricultural fund; viz: Sections 137, 160, 175 and 191. I find no additional authority, in the Agricultural Code of Alabama, 1927, for the payment of other fines arising from violations of said Code to the credit of the Agricultural Fund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 26, 1929.

The Sheriff,
Mobile, Mobile County, Alabama.

Bureau of Identification—Establishment of by Mobile County.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of October 13, 1928.

You request my opinion:

May the Board of Revenue of Mobile County legally appropriate funds for the establishment of an identification bureau for the use and benefit of said county?

In reply to your inquiry, it is my opinion that an identification bureau can only be established and maintained by an act of the Legislature.

Public funds may not be spent without an expressed provision of law authorizing the expenditure thereof. This is a well-settled principle of law.

I agree with you when you speak of the importance of an identification bureau as an aid to detecting crime, and expediting the disposition of criminals. However, I do not find where the Board of Revenue of Mobile County is given authority to appropriate monies for the establishment of such a bureau. This matter, therefore, properly addresses itself to the Legislature of Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 26, 1929.

County Superintendent of Education,
Anniston, Calhoun County, Alabama.

Schools—Annual report of County Board of Education; County Board of Revenue must furnish material therefor and County Board of Education is required to pay for printing of same.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 14, 1929.

You request my opinion:

"Should the County Board of Revenue or the County Board of Education pay for the publication of the annual school report, under a construction of Section 123, School Code of Alabama, 1927?"

In answer to your inquiry, it is my opinion that payment for the printing of said publication should be made by the County Board of Education, while the material therefor must be furnished or paid for by the County Board of Revenue or like governing body.

The section here considered enjoins the duty upon the County Board of Education to "cause to be prepared and published annually, in the month of October in sufficient quantities for distribution among the citizens of the county an annual report covering the condition, current accomplishments, and needs for the improvement of the schools, also, a statement of the business and financial transactions of the Board, etc." Under said Section the physical appearance and the contents of said report, after the insertion of certain required data, are left to the discretion of the County Board of Education.

Section 123, Alabama School Code, 1927, states that the County Board of Education "shall publish annually" etc., said report. Thus it is seen that this duty is mandatory and not discretionary

I find no authorization of law which requires the County Board of Revenue to pay for the publication of such a report. Inasmuch as the County Board of Education is required to publish said report, and the statutes are silent as to where the funds incident to the publication of the same may come from it is a construction of statute, long recognized, that payment shall come from the funds of the governmental agency which was authorized by the Legislature to incur the particular debt. Applying this principle to the instant request, you are advised that payment for said publication should be made from the education fund of Calhoun County, by the County Board of Education of said County.

Section 169, Alabama School Code, 1927, makes it the duty of the Commissioner's court, or Board of Revenue to furnish the County Superintendent of Education and his assistants with office quarters, furniture, office equipment, stationery, postage, forms and **supplies** which may be required by said superintendents or his assistants. By virtue of said Code Section, it becomes the duty of the Board of Revenue of your County to furnish the paper on which the annual report of the County Board of Education is printed. Payment for the printing of said annual report may be made from the county three-mill tax or bonus fund.

Opinion of the Atty. Gen., 1927, Vol 1, pp. 306-310 (Office Edition).

Opinion to President, Bd. of Revenue Calhoun Co., Ala., Jan. 25, 1929.

Yours, truly,
CHARLIE C. McCALL,
Attorney General.

January 28, 1929.

Court of County Commissioners,
Colbert County,
Tuscumbia, Alabama.

Since Act No. 469, approved Sept. 14, 1915, (Acts 1915, p. 489, et seq.) went into effect, there has been no general Act or Code provision giving to Courts of County Commissioners authority to levy license tax.

Opinion by Assistant Attorney General Evans.

Gentlemen:

Two of your members, Mr. G. G. Mason, Margerum, Alabama, and A. K. Bishop, Bishop, Alabama, request my opinion as to whether or not you may levy a license tax on gasoline in your county.

In reply will say that there is not, nor ever has been, any authority for a court of county commissioners in the State of Alabama, to levy a license tax upon the sale of gasoline, unless given by a local law. If you have such a local law, please cite me to it and I will then give you my opinion upon the effect of such local law.

As to the general law of the State, courts of county commissioners have been without authority to levy a license tax, except in some case especially

provided for in some Act of the Legislature, of which the sale of gasoline is not one, since Act No. 469 approved September 14, 1915, (Acts 1915, p. 489, et seq.) went into effect.

In the Code of 1907, Section 2361 has 93 subsections levying license taxes for the State. None of these, however, was on the sale of gasoline. Section 2362 of said Code gave authority to courts of county commissioners to levy tax for counties in the following words:

"The court of county commissioners of each county except in the cases otherwise provided may at any regular or special term add to the license taxes specified in the last preceding section such amounts not exceeding fifty per cent of such taxes for county purposes as, in their judgment, may be necessary, and no license shall be issued without the payment of such percentage for county purposes."

It will be noted on reading the foregoing that the authority given the court of county commissioners by said Section 2362 of the Code, 1907, was confined to adding to the licenses, levied under said Section 2361 for the State, fifty per cent for the county, except in cases otherwise provided. That is, except in cases where the county license was otherwise provided for under said section 2361 or else prohibited.

Section 2361 of the Code, 1907, was, in effect, repealed or replaced by Section 1 of said Act No. 469, approved Sept. 14, 1915.—State v. Matthews, 209 Ala. 193. This left no field of operation for Section 2362 of the Code, 1907. Besides, Section 2362 of the Code, 1907, was in effect repealed or replaced by Section 2 of said Act No. 469.

By said Section 2 of Act No. 469, the legislature itself levied the license taxes for the counties instead of conferring the power upon courts of county commissioners to make such levy. Such has been the case ever since said Act of 1915. No general power has been given to county boards of revenue to levy license taxes in addition to the State license taxes since the power given by the Code of 1907 was nullified by said Act of 1915, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 28, 1929.

Judge of Probate,
Geneva, Geneva County, Alabama.

Section 21½ of Act No. 163, approved July 22nd, 1927, construed as to quit claim deeds.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of January 23rd, is acknowledged. You inclose deed from W. S. Smith and wife to D. H. Burdeshaw of date January 12th, 1929, and ask my opinion as to what amount of filing tax should be charged. The deed is what is called a quit claim deed. It recites, as consideration for

the conveyance, ten dollars and other valuable considerations.

In reply will say that in order to determine the deed filing tax due on such instrument when offered for record, you must ascertain the fair cash value of the land conveyed; and, if there was, at the time of the conveyance, a mortgage or vendor's lien upon the land, the amount of the debt then secured should be deducted, provided such mortgage or vendor's lien has been recorded and the filing tax paid thereon. If there was no mortgage or vendor's lien on the land, which had been recorded and the filing tax paid thereon, then the entire value of the land is the proper measure for the deed filing tax due under Section 21½ of Act No. 163, approved July 22nd, 1927, (Acts 1927, page 163 et seq.). If there was at the time of such conveyance a mortgage or vendor's lien on said land, which has been recorded and the filing tax paid thereon, then the balance due on such debt, at the date the deed was executed, should be deducted from the fair cash value of the land, and the balance left is the measure of the filing tax for filing such deed for record.

The foregoing is written upon the assumption that the land conveyed was owned by the grantors. Quit claim deeds are sometimes made for a nominal consideration, by parties, who claim no real interest in the land, just for the purpose of perfecting the written title of the vendee. In such case no filing tax is required.

Said Act No. 163 is different, in some of the respects here passed upon, from Act No. 301, approved September 14th, 1923 (Acts 1923, page 318 et seq) Hence, some of the opinions heretofore given with reference to said Act No. 301 would not apply to said Act No. 163.

Where there is in the vendor a claim of a valuable interest in the property, though not the full title, which is conveyed by quit claim deed for a valuable consideration, not merely nominal, then the value of such interest is the proper measure of the filing tax required.

I am herewith returning the deed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 29, 1929.

Judge of Probate,
Ozark, Dale County, Alabama.

Tax-filing. Neither section 21½ of Act No. 163, approved July 22nd, 1927, (Acts 1927, page 163), nor section 4½ of Act No. 172, approved August 22nd, 1923, (Acts 1923, page 156) apply to the written instrument under consideration. It neither secures a debt, nor conveys real or personal property, or interest therein.

Opinion by Assistant Attorney General Evans.

Dear Judge:

Receipt of your letter of January 19th, is acknowledged. You inclose copy of an instrument in writing and ask my opinion as to whether or not a filing tax is due for recording the same, either under Section 21½ of Act

No. 163, approved July 22nd, 1927, or under Section 4½ of Act No. 172, approved August 22nd, 1923, known respectively as the mortgage filing and the deed filing tax.

In reply will say that, in my opinion, the instrument, a copy of which you inclose, is not subject to either of such taxes. The purported conveyance of timber in trust is without any consideration whatever and, therefore, invalid as a conveyance of the timber or any interest therein. Hence, it does not require a deed filing tax. It could not be construed as securing a debt. Hence, it does not require a mortgage filing tax.

The instrument is more nearly a power of attorney than anything else.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 30, 1929.

The Alabama Real Estate Commission,
CAPITOL.

Real Estate salesman—fee for renewal of license.

Opinion by Assistant Attorney General Koonce.

Gentlemen:

I have your letter of January 9, 1929. You state that Section VII of House Bill 377 states the amount of fee that shall be paid by brokers and salesmen for a real estate license.

You request my opinion:

If a man is licensed as a salesman in 1928 and in 1929 is employed by a broker who was not licensed in 1928 would the salesman's license fee be \$5.00 as though he were not licensed in 1928?

In my opinion if a salesman was licensed in 1928 and began work for a broker who was not licensed in 1928 the license fee of such salesman for 1929 would be \$2.50,

Section VII, House Bill 377 approved August 27, 1927 (General Acts 1927, p. 335) provides that a salesman's license shall be \$5.00 and that the annual renewal fee shall be \$2.50. This section also provides that when a co-partnership, association or corporation shall have paid an original fee, or a renewal fee as a broker that the fees payable by a member or officer shall be \$5.00 for the first registration fee and \$2.50 for the renewal fee, for which a salesman's license shall be issued. In my opinion this provision for payment of license by a member or officer actively engaged in the real estate business applies to members of the co-partnership, association or corporation and has no application to salesmen employed by such co-partnership, association or corporation.

A salesman can transfer from one real estate firm to another without payment of an additional fee. It appears from this that it was not the

legislative intent to require a salesman to pay a different fee when employed by a firm which had not previously engaged in the real estate business to that required of a salesman employed by a firm which had previously engaged in the real estate business.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 31, 1929.

Hon. W. H. Griffin,
Justice of the Peace,
Oxford, Alabama.

Justice of the Peace—cannot hold office of registrar.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of November 26, 1928, in which you state that you were elected a Justice of the Peace on November 6, 1928. You also state that you hold a commission as state and county registrar.

You request my opinion:

Can a Justice of the Peace hold the office of registrar?

In my opinion a Justice of the Peace cannot hold the office of registrar. Section 370, Code, 1923, provides that a registrar shall not hold an elective office during his term as registrar. This office rendered an opinion to the Judge of Probate of Covington County on December 14, 1923, (Vol. 2, Op. 1923, p. 828) in which it was held that a person cannot hold the office of Justice of the Peace and Registrar at the same time.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 31, 1929.

The President, County Board of Revenue,
Columbiana, Shelby County, Alabama.

Officers—County Quarantine and county health—the establishment of all time health unit—status of.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 20, 1928. In it you state that in November, 1927, a certain physician in your county was re-elected as county quarantine officer and county physician, for a term of three years in each case, the terms to begin January 1, 1928; that since that time there has been

organized in your county an all time health unit to begin functioning January 1, 1929; that the State Health Department has informed the Board of Revenue that the creation of said health unit automatically abolishes the office of county quarantine officer as well as county physician, and that a resolution by the Board of Revenue, a copy of which you attach to your inquiry, is sufficient legally to terminate the employment of the county quarantine officer and county physician, regardless of the date of his appointment or the length of his term.

You request my opinion:

Where the county board of revenue has appointed a physician to act as county quarantine officer and county physician and before the expiration of the term for which he was appointed, an all time health unit is created in the county, to perform among other duties, the duties of county quarantine officer and county physician, may the board of revenue pass a resolution under such circumstances revoking and annulling after a certain date, the original order of appointment of the county quarantine officer and county physician?

I am of the opinion, that under the circumstances above set forth, the effect is to terminate the employment of the county quarantine officer and county physician at the beginning of the all time health unit, and that such action on the part of the board of revenue is legal.

By Section 1063, Code of Alabama, 1923, provision is made for the appointment of a county quarantine officer in counties having no county health officer. He is appointed by the State Committee of Public Health on the recommendation of the county board of health. His tenure of office expires on the election of the county health officer. In no event may his term of office be for more than three years from the date of his appointment. He may be removed from office by the State Committee of Public Health when in its judgment, the public good requires such removal. Construing Section 1063, in my judgment, as soon as the county health unit begins functioning, the tenure of office of the quarantine officer is terminated.

Your attention is also invited to Sections 4823-4824, Code of Alabama, 1923. These Code sections authorize the board of revenue to elect a county physician to perform certain duties. The board fixes the term of office, which may not be for a longer period than two years, and the appointee may be removed at the will of the board. The resolution passed by your board is sufficient to terminate the contract with the county physician under said Code sections.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 31, 1929.

Mr. W. L. Allen,
License Inspector,
Montgomery, Alabama.

License and ad valorem tax on motor vehicles, to be valid, must be paid in the county of residence of the owner.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of January 15, 1929, is acknowledged. You wish my opinion upon the following state of facts:

Certain residents of the City of Montgomery, County of Montgomery, State of Alabama, paid taxes upon their motor vehicles and took out license for same—some in Elmore County and some in Autauga County. You have cited these persons to take out license in Montgomery County. You wish my opinion as to whether or not, under the facts so stated, such persons are due a license and ad valorem tax in Montgomery County, or does the paying of the tax and taking out license in the other county relieve such person from the obligation of taking out the license and paying the ad valorem tax in Montgomery County.

In reply will say that Section 18 of Act No. 163, approved July 22, 1927, (Acts 1927, page 158 et seq.) directs where such taxes are to be paid. This section provides that, "on and after the first day of October, 1923, every person, firm, or corporation who desires to operate a motor vehicle on the public highways of Alabama shall first return such motor vehicle for ad valorem taxation to the tax assessor of the county in which he resides, for the preceding tax year, and the tax assessor of such county shall deliver to such person who makes the return as herein required a certificate of assessment on a form prescribed by the State Tax Commission, and such certificate shall be the warrant of the Tax Collector to collect the tax as shown thereon."

Section 23 of Act No. 290, approved Sept. 13, 1923, provides:

The money collected as motor vehicle license taxes, less all expenses necessary or incident to the collection of such taxes including the printing and distribution of assessment blanks, blank receipts and license blanks, shall be distributed as follows: eighty per cent (80%) to the state and twenty per cent (20%) to the incorporated city or town in which the owner of the motor vehicle resides, and twenty per cent (20%) to the county, if the owner of the motor vehicle resides outside of an incorporated city or town.

The foregoing sections clearly show that the ad valorem taxes must be paid and the license taken out in the county where the owner resides. No valid license can issue until the ad valorem taxes due are assessed and paid in the county where the owner resides. When the license is collected it must be distributed; eighty per cent (80%) to the state, twenty per cent (20%) to the city if the owner resides in the city, and if he resides in the county outside of a city, twenty per cent (20%) to the county of such residence.

For a resident of the City of Montgomery to be allowed to take out a license and pay ad valorem taxes on his motor vehicle in a county other than

Montgomery County would be to deprive the City of Montgomery and County of Montgomery of the **ad valorem** taxes due them and also of the license taxes due them. A license so issued, not being issued according to law, is void. You should proceed against him as against any other delinquent.

The foregoing applies to all motor vehicles owned by individuals:

Where the motor vehicle is owned by a firm, corporation or association, said Section 18 of said Act No. 163 provides that the **ad valorem** tax shall be paid in the county in which said motor vehicle is used or operated. This means the county where the business is carried on in connection with which and from which the motor vehicle is used. For instance a merchant with his place of business in the City of Montgomery may operate trucks in connection with such business and with them deliver freight from Montgomery into other counties than Montgomery County. In such case the **ad valorem** tax must be paid and the license taken out in Montgomery County alone. It is not intended that such firm, corporation or association shall pay **ad valorem** tax and take out license in every county into which freight may be carried by a motor vehicle but only in the county in which and from which the truck is operated.

Paying the **ad valorem** tax, when **ad valorem** tax is due, is a condition precedent to taking a valid license. The statutes state where the **ad valorem** tax shall be paid and no valid license can be issued until such tax is paid as directed by the statute. The firm, corporation or association operating a motor vehicle on the highways of the State without having procured a license in the manner provided by the statute is a delinquent.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 1, 1929.

The Probate Judge,
Clanton, Chilton County, Alabama.

Courts of County Commissioners have no authority to allow claim of town or city for constructing pavement on street surrounding court house unless contract has been made by such court for such construction in the manner provided by law.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of January 25, 1929, is acknowledged. You state the following facts:

The Town of Clanton, about three years ago, paved the main street of said town around the court house of the county of Chilton, located in said town, assessing, in the usual manner, the cost of such improvement against the adjoining property owners. No claim for the cost of

such improvement around the court house was presented to the Court of County Commissioners within two years after the work was completed.

You wish me to advise you whether or not the Court of County Commissioners could legally waive the nonpresentment of such claim within one year, and allow the claim for payment.

In reply will say that the provisions of Section 228 of the Code, 1923, with reference to the presentation of claims against counties are mandatory and leave no discretion in the Court of County Commissioners, even in cases of originally valid claims against the county. The facts which you state constitute no valid claim against the county, and, in my opinion, could not have been legally allowed had such claim been presented withing twelve months from completion of the work. The town had a right to pave its streets and to assess the cost of such improvement against adjoining property where such property was owned by individuals or private corporations.—Article 33, Code, 1923, p. 1110 et seq. This right did not extend to property owned by the county for governmental purposes, such as court house and lot. —City of Huntsville vs. Madison County.

Where a Court of County Commissioners desire the streets around the court house paved it may contract to have such streets paved.—Section 175 of Act No. 347, approved August 23, 1927 (Acts 1927, p. 396) which was Section 1367, Code, 1923. Where the cost of exceeds two hundred and fifty dollars, advertisement for bids must be made and bond given by the contractor.—Section 170 of Act last above cited which was Section 1361 of Code, 1923. There is no authority to pay for such paving by the Court of County Commissioners except where constructed under contract with such Court in the manner prescribed by statute.

Under the facts stated by you the Town of Clanton, in my opinion, had no claim against the County of Chilton which the Court of County Commissioners had authority to allow even though presented within one year after construction was completed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 2, 1929.

The State Tax Commission,
CAPITOL.

Attention: Mr. Brassell.

Cap pistols, no license on if sold without caps.

Opinion by Assistant Attorney General Koonce.

Gentlemen:

I have your letter of January 9, 1929, in which you state that you have been advised many times by this office that the sale of cap pistols without the caps did not require a license.

You request my opinion:

Does the sale of cap pistols without the caps make the seller liable for fireworks license required by schedule 52, Acts 1919?

In my opinion, the sale of cap pistols without the caps does not make the seller liable for license mentioned in the above schedule.

Schedule 52 (General Acts, 1919, page 411) imposes a license upon dealers in fireworks, such as roman candles, sky rockets, torpedoes, fire crackers, cannon crackers, cap guns, etc.

The schedule referred to above, specifies cap guns but does not specify cap pistols. However, there can be no doubt that said schedule imposes a license on cap pistols when sold with caps. The sale of cap pistols without caps would not constitute the sale of fireworks, within the contemplation of schedule 52. I rendered an opinion to this effect to the Judge of Probate of Bullock County on September 28, 1928, Vol. 7, (Office Edition) page 202.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1929.

County Superintendent of Education,
Abbeville, Henry County, Alabama.

Schools—can be taught more than five days each week.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 12, 1929. You request my opinion:

Can a County Board of Education authorize a public school to be taught six days per week or twenty-four days per month and pay for same legally out of public school funds?

In my opinion, your question must be answered in the affirmative. Section 319, School Code 1927 provides that twenty days, with five days each week shall constitute a school month. However, said Section does not prohibit more than five days a week. I do not know of any law which provides that school shall not be taught more than five days each week. There might be some question as to whether or not you could compel pupils to attend beyond the statutory school month. However, I am not passing on that question.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1929.

The Mayor,
Castleberry, Alabama.

Attention: Hon. A. H. Riley.

Offices: One may not at one and the same time hold the offices, under this State, of mayor of a municipality and jury commissioner of a county.

Upon qualifying as mayor of a municipality one vacates the office of jury commissioner which one held at the time of such qualification.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of January 14th.

You state that at the time you were elected mayor of the Town of Castleberry and qualified as such you were a jury commissioner of Conecuh County.

You inquire whether or not you may hold the offices of mayor and jury commissioner at one and the same time and also whether or not your acceptance and qualification for the office of mayor vacated the office of jury commissioner.

I am of the opinion that you may not hold the two offices mentioned at one and the same time. I am also of the opinion that your acceptance of the latter office, that is the mayoralty, ipso facto vacated the office of jury commissioner.

Mayor of a municipality is an office of profit under this State.

Act approved Sept. 9, 1927 (General Acts 1927, p. 706).

Montgomery vs. State ex rel Enslen, 107 Ala. 372.

A jury commissioner of a county holds an office of profit under this State. ✓

Lacy vs. State, 13 Ala. App. 227.

Montgomery vs. State, supra.

One may not at one and the same time hold two offices of profit under this State.

Section 280, Constitution 1901.

Opinion Attorney General (Office Ed.) Vol. 8, p. 38.

Opinion Attorney General Oct. 12, 1925 (Office Ed.) Vol. 3, p. 309.

Where one may not hold two offices at one and the same time the acceptance of the latter office vacates the first office.

Shepherd vs. Sartain, 185 Ala. 439.

Attorney General vs. Oakman, 86 N.W. 151.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1929

Judge of Probate,
Camden, Wilcox County, Alabama.

License—who are coal dealers.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 27, 1928, in which you state a number of persons in your county order coal in car load lots, but make no profit in the transaction.

You request my opinion:

Are such persons required to take out license as coal dealers under Schedule 29, Revenue Code, 1923?

Schedule 29, Revenue Law, 1923, p. 175, begins with the expression "each person dealing in coal or coke * * *." In the case of Overall v. Bezeau, 37 Mich. 503, a dealer is defined as "one who makes successive sales as a business." Again in the case of Carter v. State, 44 Ala. 29, it is said "a dealer in tobacco within the meaning of the revenue law—one that is required to take out a license—is a person whose business, occupation, employment or vocation, is to deal in tobacco; in other words, a tobacconist. It is not everyone who sells tobacco that is required to take out a license, but only dealers in tobacco.

Bryant v. State, 46 Ala. 303;

Espy v. State, 47 Ala. 538;

Harrison v. State, 50 Ala. 130.

It is my opinion that one who orders coal in car lots but makes no profit in the transaction, is not a dealer in the sense that would require him to take out a license, as is provided by Schedule 29, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1929.

Hon. Ben S. Evans,
State License Inspector,
Akron, Alabama.

Weapons—Carrying of by License Inspectors.

Opinion by the Attorney General.

Dear Sir:

I have your letter of December 29, 1928, in which you state that you are a State License Inspector for Hale, Greene and Bibb Counties.

You request my opinion:

Has a duly appointed and qualified License Inspector the right to carry a pistol while in the discharge of his duties?

In answer to your question will state that I am of the opinion that such a license inspector has the right openly to carry a pistol.

It is true that Section 3487, Code of Alabama, 1923, does not exempt a State License Inspector from the provisions of that criminal statute which prohibits one from carrying a pistol about his person on premises not his own or under his control. However, I find that by Section 72 of an Act approved July 22, 1927 (General Acts 1927, p. 185), it is stated:

"License Inspectors shall have the same power to arrest persons violating the Revenue Laws of the State as is now vested in the sheriffs of the State, * * *."

By Section 3487 of the Code, *supra*, the carrying of a pistol by a sheriff about his person on premises not his own or under his control is, in effect, permitted. The object of excepting the peace officers named in Section 3487, is because it is well known that, in the discharge of their duties as such officers, they are continually required to make arrests and to suppress crime, and in doing so it is a matter of common knowledge that the peace officer will be armed in such way as that he may effectuate the full discharge of his duties. Since a license inspector has the same power to arrest persons violating the Revenue Laws of the State that a sheriff has, then it logically follows that he is entitled to carry a weapon for the same purpose that a sheriff may carry it, for otherwise to hold would in effect lessen the power of the license inspector. The reasoning here set forth applies equally to members of the state police force. No officer has any more right to carry a **concealed** pistol than a private individual, and no person whether he be a sheriff or a private citizen may carry concealed about his person the weapons mentioned in Section 3485 of the Code. However, where one is arrested for carrying such a weapon concealed about his person he may give evidence that, at the time of carrying the weapon concealed, he had good reason to apprehend an attack, and the jury may consider such evidence in mitigation of the punishment or in justification of the offense. Still this is a question for the jury to decide upon, and the courts have held that where the evidence is given that there was good reason to apprehend an attack, the attack apprehended must be from a specific source or person. The ordinary perils incident to the discharge of one's duty, cannot be included within this exception.

Incidentally, I might say, that I have conferred with the Chairman, State Tax Commission, suggesting to him that State License Inspectors be furnished with badges of authority as such Inspectors.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 6, 1929.

The Chief Examiner of Accounts,
Department of Examiners of Accounts,
CAPITOL.

No need filing tax required on filing for record assignments of mortgages.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of January 14, 1929, is acknowledged. You attach to your letter certain assignments of mortgages, to-wit:

1st. Charles Forman to North American Life Ins. Co. filed for record Dec. 21, 1923;

2nd. Robertson Banking Co. to First National Bank of Eutaw, filed for record March 29, 1924;

3rd. J. L. McCardy to Mrs. W. R. Larkin, filed for record June 17, 1924;

4th. Mabry Securities Company to W. A. Menefee, filed for record October 29, 1924;

5th. Jemison & Company, Inc., to Metropolitan Life Insurance Company, filed for record July 5, 1924;

6th. E. P. Walsh to Robertson Banking Company, filed for record October 26, 1925;

7th. Robertson Banking Company to Carmie O. Daughdrill, filed for record April 17, 1926.

You wish my opinion as to what tax is due for filing said assignments for record, if any.

In reply will say that each of these assignments were filed for record after the approval of Act. No. 301, approved September 14, 1923 (Acts 1923, page 318), and prior to the approval of Act No. 163, approved July 22, 1927 (Acts 1927, page 139).

In construing Section 1 of said Act No. 301, which contained the law with reference to deed filing tax at the dates of filing each of said assignments for record, in the case of Garrison v. Hamlin, the Supreme Court held that neither a mortgage nor the interest in property conveyed by a mortgage, was property, real or personal, within the meaning of said Act and that, therefore, no filing tax was due for filing for record an assignment of a mortgage, although the assignment conveyed the property to the assignee which had been conveyed to the assignor by the mortgage.

In the 1927 Act, the Legislature amended the 1923 Act so to conform to the opinion of the Supreme Court in said case of Garrison vs. Hamlin.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 6, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Schools—Incidental fees—matriculation fees—collection and disposition of.

Opinion by Attorney General.

Dear Sir:

I have your letter of January 24, 1929, enclosing letter from Hon. R. V. Allgood, Assistant Examiner of Accounts, in which my attention is called to Sections 182, 295, 467, Alabama School Code, 1927, and in which it is stated that in the City of Tuskegee the elementary and high schools are combined and the funds arising from matriculation and incidental fees collected are handled by the principal of said school. You further state that all fees collected in accredited high schools in Macon County, except the county high schools, have been handled in accordance with Section 182 of said School Code.

You request my opinion:

First. Who is the custodian of matriculation fees collected in county high schools, including the County High Schools?

Second. Is the principal of the school in Tuskegee required to pay all high school fees to the County Treasurer of School Funds and may he continue to collect and expend elementary fees?

In answer to your first question will state that the County Treasurer of School Funds is the proper custodian of the matriculation fees collected in county high schools.

In answering your second question will state that the principal should collect the matriculation fees in the schools of Tuskegee and all matriculation fees collected for the county high schools should be turned over to the County Treasurer of School Funds.

Your attention is invited to Section 295, Alabama School Code, 1927, which makes the County Treasurer of School Funds the custodian of all funds or proceeds of any character which may accrue to the county for public school purposes, including funds for county high schools.

You state that fees collected in Macon County in all accredited high schools except the county high schools had been handled in accordance with Section 182 of said School Code. This should not be done. With regard to fees collected in accredited high schools, including county high schools, such fees should be handled in accordance with Section 467, Alabama School Code. Section 182 has application to schools which do not come within the provisions of Section 467.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 7, 1929.

Judge of Probate,
Wedowee, Randolph County, Alabama.

Motor Carriers—Public Service Commission.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 25, 1929, in which you state that there are four or five men who live in Wedowee and haul by truck between Roanoke and Wedowee and elsewhere. These men do not run their trucks on any schedule or over any particular route and that the Alabama Public Service Commission has called on them to take out a certificate of public convenience and necessity authorizing them to do business.

Upon this statement you request the opinion of the Attorney General as follows:

Do these men under the above facts come within the Alabama Motor Carrier Act of 1927.

It is apparent from your letter the persons referred to have been cited by the Alabama Public Service Commission to show cause why they should not be required to apply for and obtain a certificate of convenience and necessity under Section 11 of the Alabama Motor Carrier Act 1927, said section being as follows:

"Sec. 11. If any motor vehicle shall be operated over any public highway of this State in such manner as to come into competition with any motor carrier operating under a certificate issued by the Commission, if such motor vehicle is operated between fixed termini or over a regular route, even though there may be periodic or irregular departure from such termini or route, the commission may investigate the operation of such motor vehicle, and if, upon notice, hearing and investigation, the commission finds that such motor vehicle is being operated in competition with any such motor carrier, the commission may order the operator of any such motor vehicle to cease and desist from such operation, or the commission may require the operator of such motor vehicle to apply for and obtain a certificate of convenience and necessity hereunder before such motor vehicle shall be allowed to continue such operation. Any certificate of convenience and necessity issued to the operator of such motor vehicle shall be subject to all the terms and provisions of this Act and the operator thereof shall thereafter be deemed a motor carrier and subject to the provisions of this Act"

The Alabama Public Service Commission is charged with the duty upon notice and hearing to determine whether under all the facts these men are subject to the above referred to Act, this is a question of fact which this office cannot pass upon.

I would suggest that the parties referred to in your letter request the Commission to set a date and place for a hearing upon the facts, and I feel

sure that they will take into consideration the facts stated by you, and render judgment accordingly. In the event the Commission should decide that these men are subject to the Act referred to, then they would have the right under the statute to appeal from the order of the Commission to the Circuit Court of the County, sitting in equity, for a review.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 7, 1929.

Deputy Solicitor,
Camden, Wilcox County, Alabama.

Mortgage—Description of Property.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 6, 1928, in which you state that the description in a certain mortgage reads as follows: "any three hundred head of cattle that I now own or may own until this note is paid."

You request my opinion:

If any cattle owned by the mortgagor are sold can the mortgagor be convicted for disposing of mortgaged property under the above description?

In reply will say that such a mortgage is void for uncertainty.—Comer vs. Lehman, Durr & Co., 87 Ala. 362, and 89 Ala. 579.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 7, 1929.

The Probate Judge,
Tuskegee, Macon County, Alabama.

Deed filing tax. When mortgage debts and debts secured by vendor's lien to be deducted from value of property conveyed. Act. No. 163, approved July 22, 1927.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of January 29, 1929, is acknowledged. You wish my opinion as to what amount of privilege tax should be collected on filing for record a deed wherein the recited consideration is "cash in hand paid twelve thousand dollars and the assumption of a mortgage of twelve thousand dollars."

In reply will say that your question is answered by Section 21½ of Act No. 163, approved July 22, 1927. (Acts, 1927, page 163.)

I will here copy so much of said Section as is applicable to your question:

"No deed * * *, which conveys any real property * * * within this State, or which conveys any interest in such property * * * shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record, to-wit: upon all such instruments executed to convey real or personal property situated in this State of the value of five hundred dollars or less there shall be paid the sum of fifty cents, and upon all such instruments executed to convey real or personal property situated in this State of more than five hundred dollars in value there shall be paid the sum of fifty cents for each five hundred dollars or fraction thereof in value of the property conveyed by such instrument. Provided, that only the value in excess of any mortgages or vendor's lien upon any property within this State on which the mortgage tax has been paid, shall be taxable under this section" etc.

You will see from the foregoing that where there was, at the date of the execution of the deed offered for record, a mortgage or vendor's lien upon the property conveyed by the deed, which mortgage or vendor's lien had, itself, been recorded and the privilege filing tax paid thereon, only the value of the property conveyed in excess of the mortgage debt or debt secured by such vendor's lien is taxable. If the mortgage or vendor's lien has not been recorded and the tax paid thereon then no reduction is allowed.

In the question asked, you fail to state whether or not the mortgage on the property conveyed had been recorded and the filing tax thereon paid. If such mortgage had been recorded and the filing tax thereon paid, then the amount of the mortgage debt should be deducted from the total value of the property conveyed and the amount of value remaining constitutes the measure of the tax for filing the deed for record. If the filing tax on the mortgage has not been paid then there is no deduction allowable.

Said Section 21½ of Act No. 163 is, in effect, but an amendment of Act. No. 301, approved September 14, 1923, (Acts 1923, page 318). The provision for such deduction of mortgages and vendor's liens was not in said 1923 Act.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 8, 1929.

County Treasurer,
Birmingham, Jefferson County, Alabama.

Officers—House Bill 908 (General Acts 1927, p. 504), fixing the salary of the Judge of the Inferior Court of cities of this State having a certain population and only one Judge who has civil and criminal jurisdiction, is valid.

Opinion by Assistant Attorney General Knight.

Dear Sir:

It has just come to my attention that possibly a request contained in your letter of November 3, 1927, has not been answered. You inquire as to the constitutionality of House Bill 908, General Acts, 1927, p. 504, which fixes and regulates the salary of the officers of an Inferior Court in cities of over one hundred thousand population, of which Court there is only one judge who has both civil and criminal jurisdiction.

I am of the opinion that the Act is valid. It appears that there was no necessity for a compliance with Section 106 of the Constitution as to publication of notice of the intention to apply for the passage of the Act.

The Act was cast in a form which, according to rulings of the Supreme Court of this State, gave the same a prospective field of operation.

Walden vs. City of Montgomery, 108 So. 231.

The classification employed in the Act appears to be reasonably related to the purpose to be affected.

Reynolds vs. Collier, 85 So. 465, Vaughn vs. Dawson, 102 So. 222.

I am not unmindful of the effect of the decision in State vs. Weakley, 45 So. 175, which frowns upon a double classification. However, the differentiation pointed out in the case of Board of Revenue of Jefferson County vs. Huey, 70 So. p. 744, is easily applicable to the present case.

In view of recent interpretations of the import of the decisions cited supra, by our Supreme Court, I am of the opinion that the Act in question would be upheld as a legitimate exercise of legislative discretion in enacting general laws.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

County Treasurer,
Clanton, Chilton County, Alabama.

February 8, 1929.

Witnesses—Summoned and who appear in Circuit Court in criminal cases should be paid regardless of whether they testify or not.

Opinion by Special Assistant Attorney General Smith.

Dear Madam:

I have your letter of February 2, 1929, in which you submit the following statement of facts:

"A few days ago a boy in this County was indicted by the Grand Jury of this County and brought into Circuit Court to be tried by it, but it was proven that he was under sixteen years of age and the case was transferred to the Juvenile Court and he was tried by it. The State's witnesses were summoned by the Circuit Clerk to appear in the Circuit Court but they testified in the Juvenile Court."

Upon this statement of facts you request the opinion of the Attorney General upon the following question of law:

Whether or not it is your duty as Treasurer to pay these witnesses.

I am of the opinion that where an indictment is returned in the Circuit Court against a person and the trial is regularly set in the Circuit Court, and witnesses are regularly summoned and they appear in accordance with said summons, but when the case is called for trial it is judicially decided by the court that the person so indicted is under sixteen years of age and transfers the case to the Juvenile Court and the witnesses then testify in the Juvenile Court, the witnesses should be paid their attendance as other witnesses are paid for attendance in the Circuit Court. The fact that the witnesses after being summoned and attending court did not testify in said Court would not deprive them of their pay as witnesses in the Circuit Court.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 8, 1929.

The Alabama Real Estate Commission,
CAPITOL.

Alabama Real Estate Commission—Authority to make rules and regulations.

Opinion by Assistant Attorney General Koonce.

Gentlemen:

I have your letter of January 10, 1929. In it you refer to Section V of the Act creating the Alabama Real Estate Commission (General Acts 1927, page 338).

You request my opinion:

1. Can the Alabama Real Estate Commission make a rule or regulation requiring every broker who does not get his renewal application to the office of the Commission by February 1, 1929, to pay a penalty of \$2.00?
2. Can the Alabama Real Estate Commission make a rule or regulation requiring every salesman who does not get his renewal application to make application to the office of the Commission by February 1, 1929, to pay a penalty of \$1.00?

In my opinion the Commission has authority to make the above regulations.

You will observe that the above Section V (General Acts 1927, p. 338) gives the Commission authority to make reasonable rules and regulations; such rules and regulations to be subject to the approval of the Governor. In my opinion this provision requiring brokers and salesmen to pay a penalty for failure to send in their application for renewal license is authorized by Section V referred to above. Brokers and salesmen will, no doubt, show a tendency to delay filing their applications for renewal of their licenses if such a regulation as you mention is not made and enforced. Clearly, such a regulation is a reasonable one connected with the application for license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 9, 1929.

Sheriff,
Pell City, St. Clair County, Alabama.

Sheriffs: Allowances for feeding prisoners in a county where there are two jails must make a report for each jail.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of January 19, 1929.

You state that there is a jail at Ashville and one at Pell City in St. Clair County. This situation arose by the division of the Circuit Court of your County.

You inquire whether or not the allowance for feeding prisoners, provided by an Act approved September 6, 1927 (General Acts 1927, p. 693), should be computed as if the two jails were in separate counties.

You also inquire whether or not you should make a consolidated report for the two jails.

I am of the opinion that your allowance for serving and preparing food for prisoners should be computed as if the jails were in separate counties. That is, your allowance for the prisoners in the Pell City jail should be computed as if you had no other jail in St. Clair County and your allowance for the Ashville jail arrived at in the same manner, according to the scale mentioned in the Act of 1927 last referred to.

Necessarily it follows that you should make a separate report for each jail.

Of course, under the Act of 1927, you are not entitled to have your allowance computed by the scale therein provided until the Act became effective.

Section 9, Act approved Sept. 6, 1927 (General Acts, 1927, p. 693).

It is clear that the allowance to the Sheriff for the service mentioned in this Act was made in consideration of the possible expense to which the Sheriff may have been put by reason of his having to prepare and serve the food to the prisoners in each jail.

Indicative of this conclusion is the provision to the effect that the allowance must be fixed on a sliding scale. The amount allowed per capita decreases with an increase of numbers.

Also the provision that where a sheriff is on a salary basis the money allowed for this service shall be paid into the county treasury and that the county shall provide someone, at the county's expense, to perform this service, demonstrates the intention of the Legislature that the service is to be compensated according to the number of jails for which food is to be prepared and served. In your case two such services must be performed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 9, 1929.

The Judge of Probate,
Gadsden, Etowah County, Alabama.

Non-resident contractors not liable for penalty of fifteen per cent without first being cited for doing business without a license.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your telegram of February 8, 1929, in which you state that the License Inspector of Etowah County has reported to you that certain contractors, who have construction contracts, are delinquent, and subject to a penalty of fifteen per cent.

You request my opinion:

1. Is a contractor liable for the fifteen per cent penalty without first having been served with a citation?

In answer to your question, I am of the opinion that a contractor is not liable for the penalty of fifteen per cent unless such contractor has first been served with a citation.

See Section 72 of an Act approved July 22, 1927, (General Acts of Alabama, 1927, p. 139.)

Opinions of Attorney General, Book 6 (Office Edition, p. 51.)

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 9, 1929.

The County Solicitor,
Decatur, Morgan County, Alabama.

Code of Alabama and Alabama Reports—Distribution of to the Solicitor of Morgan County, Alabama.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 24, 1929. You request my opinion:

Is the solicitor of Morgan County, Alabama, entitled to the Supreme Court Reports, Appellate Court Reports and a copy of the Code of Alabama under our distribution statutes?

In answer to your inquiry, it is my opinion that the solicitor of Morgan County is, under the laws of Alabama, entitled to the books enumerated in the foregoing question.

By an Act approved August 23, 1927 (Local Acts, 1927, p. 219), the County Court of Morgan County is given concurrent jurisdiction with the Circuit Court of Morgan County. The solicitor of said court has the rights, powers, and duties of a circuit solicitor.

Therefore, under the authority contained in Sections 793 and 10342, Code of Alabama, 1923, the solicitor of the Morgan County Court is entitled to a copy of the Alabama Acts and Code, together with copies of the Alabama Reports from both the Supreme Court and Court of Appeals, without expense to said solicitor.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 9, 1929.

Hon. Claud Lambert,
Constable Beat 5,
Bamford, Shelby County, Ala.

Search Warrants: Officers may not search passengers in a railroad coach unless such passengers are named in the warrant.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of January 17, 1929.

You inquire, in substance, whether or not you are authorized to search the passengers in a railroad coach and their personal effects under a search warrant authorizing you to search train or coaches or a particular coach.

You state that you obtained a search warrant authorizing you to search a certain coach of a passenger train.

I am of the opinion that such a warrant would not authorize you to search each passenger and his personal effects. Of course such warrant would be sufficient authority to search the coach, but not the passengers or their personal effects.

Section 4743, Code of Alabama, 1923.

There must be some description of the particular person or effects to be searched. The necessarily general description of the coach must be aided by a description or name of the particular person to be searched.

Simply because you might have cause for believing that some one might have whiskey in his possession on a railroad coach, you would not be authorized to indiscriminately search all persons on the coach, thereby subjecting some to gross indignities without probable cause for believing the individual had in his possession prohibited liquors contrary to law.

Huger v. Abramson, 215 Ala. 174.

A statute authorizing searches and seizures confers extraordinary and harsh remedies and must be strictly complied with, and a search warrant can lawfully issue only in the cases and with the formalities prescribed by statute.

State ex rel, Attorney General, 60 So. 285.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 9, 1929.

Commissioner of Agriculture and Industries,
CAPITOL.

Dear Sir:

Amendment to the Constitution of the State of Alabama, proposed by Act No. 345, approved August 25, 1927, and adopted by election on November 6, 1928, is valid and self executing.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of January 10, 1929, is acknowledged. You make the following statement of facts:

In accordance with the provisions of Act No. 167, approved March 4, 1915 (Acts 1915, page 167 et seq), several drainage districts were duly organized and proceeded in the execution of the powers supposed to be conferred by said Act, and which would have been conferred had said Act been Constitutional.

On May the 29th, 1924, the Supreme Court of Alabama handed down an opinion in the case of Collins, Judge, vs. Hollis, 212 Ala. 294, holding said Act, together with the amendment thereto, found in Article 40 of the

Agricultural Code, 1923, to be unconstitutional, as being repugnant to Sections 23 and 212 of the Constitution of the State of Alabama.

By Act No. 345, Acts 1927, page 346 et seq., an amendment to the Constitution of the State of Alabama was proposed and in the November election, 1928, was duly adopted.

You wish to know what is now the status of the Drainage Districts duly organized under the said 1915 Act.

You will observe, on reading the amendment that it provides that the "amendment shall be retroactive and retrospective and shall operate to ratify, confirm and validate the Act of the Legislature of Alabama, which Act provided for the drainage of farm, wet, swamp and overflow lands in the State of Alabama and authorized the organization of drainage districts, conferred the right of eminent domain to the extent necessary to carry out the purpose of said Act and provided for raising of Revenue by bond issue or otherwise to pay the cost and expense of installing and maintaining drainage systems so as to promote the public health and general welfare and, which Act was approved March 4, 1915; and this amendment shall operate to confirm and validate all corporate organizations under authority of such law, all procedure had, all acts done, all bonds issued, contracts entered into and assessments made by such corporations under authority of such law."

It will readily be seen that drainage districts duly organized under said 1915 Act and all of the Acts done by such organizations under the provisions of said Act, have, by express provision of said amendment, been ratified and validated, and that such organizations have been vitalized so as now to proceed from where they left off after the said decision of the Supreme Court, if said amendment to the Constitution is itself valid.

The amendment, by its express terms, is clearly retroactive, in certain respects. In the case of *ex parte Buckley*, 53 Alabama, 42, our Supreme Court say: "statutes which are intended to remedy a mischief, promote public justice, correct innocent mistakes into which parties have fallen, cure irregularities, or give effect to the acts and contracts of individuals fairly made and done, although having a retroactive effect, are not subject to the judicial condemnation visited upon retrospective statutes in general, and are to be construed liberally to advance the beneficent purposes for which they are enacted."—Cited in *Carey vs. Simmons*, 87 Ala. 528; *Abbett vs. Page*, 92 Ala. 576; *Enslen v. Wheeler*, 98 Ala. 206; *Birmingham Trust and Savings Co. v. East Lake Land Co.* 101 Ala. 307. I can think of no reason why the same rule as announced above should not apply to an amendment to the Constitution of the State voted for a like purpose. But for inhibitions of the State Constitution, the legislature might have passed an act with the effect intended by said amendment. In other words the State Legislature possesses full power to legislate upon any subject affecting the people of the State, and within the territory of the state, except as it is prohibited by the Constitution of the State or that of the United States. The people of the State, in the manner provided by the Constitution of the State, may change the Constitution of the State so as to remove any inhibition theretofore contained in the Constitution, provided such amendment does not conflict with the Constitution

of the United States. In the amendment under consideration I find no such conflict, and, in my opinion, said amendment is valid and effective in all of its parts. There being no such conflict, said amendment is "the voice of the people of the State of Alabama speaking in their sovereign capacity" upon the matters contained therein.

Harris vs. Walker, Superintendent of Banks 74 So. 40;
Phoenix Assurance Company v. Montgomery Fire Department, 117
Ala. 631; 42 L. R. A. 468.

In my opinion the amendment is valid and self executing.

Hammond v. Clarke, 136 Ga., 313; 38 L. R. A. (N. S.) 77;
Fontinat vs. Young, 128 La. 20; 54 Sou. 408; State v. Lohnke, 109
La. 838.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 9, 1929.

The Alabama Real Estate Commission,
CAPITOL.

Real Estate License—exemption from payment.

Opinion by Assistant Attorney General Koonce.

Dear Sirs:

I have your letter of February 6, 1929, in which you refer to Section 2 of the Act creating the Alabama Real Estate Commission (General Acts 1927, p. 336).

You request my opinion:

Has the Alabama Real Estate Commission the authority to require persons employed by companies handling their own property to procure a license if said persons are employed on a commission basis?

In my opinion the Commission does not have the authority to require such persons to procure a license if such persons are regular employees of the owner of the property. In my opinion the mere fact that such persons are employed on a commission basis would not make them liable for license.

Section 2 of the Act approved August 27, 1927, (General Acts 1927, p. 336) states that the provisions of said Act shall not apply to persons, co-partnerships, associations or corporations who are owners or lessors or to the regular employees thereof.

Webster's New International Dictionary includes the following definition of "employee:—"

"One employed by another."

The Supreme Court of Alabama has not rendered any decision holding that the mode of payment governs in ascertaining whether one is an employee or not. I find, however, that the Kentucky case of *Employers' Idemnity Co. of Philadelphia v. Kelley Coal Co.*, 149 S. W. 992; 149 Ky. 712, contains the following:

"'An employee' is one who works for and under the control of his employer; and the mode of payment, while a circumstance to be considered in determining the question, is not decisive."

The Section of the Real Estate Act referred to above, states that the provisions of the Act shall not apply to the regular employees of the owner or lessor of property. It seems, therefore, that regular employees of the owner or lessor of property are not required to take out a license, even though such employees be employed on a commission basis.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 11, 1929.

Judge of Probate,

Prattville, Autauga County, Alabama.

Counties—purchase of books, stationery, etc.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 29, 1929. You refer to Section 7½ of an Act approved September 30, 1919, (General Acts 1919, page 1121), which gave the Board of Control (now Board of Administration) authority to purchase supplies for the various counties.

You request my opinion:

Has the above law been repealed so that counties cannot get the same discounts that they used to be allowed by the different companies on office supplies, such as stationery, typewriters, etc?

In my opinion such supplies for the various counties are to be purchased by said counties and not by the State Board of Administration.

Section 7½ of the Act of 1919 referred to above was repealed by an Act approved February 10, 1923 (General Acts 1923, page 39)

Section 9604, Code of Alabama, 1923, as amended by an Act approved September 6, 1927 (General Acts, 1927, p. 693), provides that the county officers enumerated therein shall be allowed reasonable expenses for suitable books, stationery, etc., to be paid for by the county on approval of the Court of County Commissioners, Board of Revenue or other like governing body.

I rendered an opinion on May 31, 1928, to the Judge of Probate of Etowah

County (Vol. 5 Office Edition, p. 302) in which I referred to Section 9604 as amended, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 11, 1929.

County Solicitor,
Florence, Lauderdale County, Alabama.

Motor vehicle unlawfully damaged—Half of fine paid to owner thereof. Damages under Section 3337, Code of Alabama, 1923.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 16, 1929.

You state that two persons plead guilty to using the car of another without his permission and that the car when so used was damaged. That the defendants were fined and upon default in paying the fines were sentenced to hard labor.

You request my opinion:

When a defendant is sentenced to hard labor in lieu of a money fine for the violation of Section 3337, Code of Alabama, 1923, which provides that a person who uses the motor car of another without the owner's consent is guilty of a misdemeanor; "and if it be shown on the trial of said cause that the motor vehicle so unlawfully used has been damaged in whole or in part by such person, then the fine imposed shall not be less than twice the amount of the damages shown and one-half of such fine shall be paid to the owner of such motor vehicle;" is the owner of said motor vehicle to be paid half of said fine so worked out?

In answer to your inquiry, it is my opinion that, under the facts as stated by you, the owner is not entitled to damages. Section 3337, Code of Alabama, 1923, refers only to cash fines in the matter of paying half of the damages sustained to the owner of the automobile which is damaged.

The law of costs, fees and penalties is penal in its nature, and no fee, cost, or penalty may be legally collected in the absence of an express authorization therefor.

Lee v. Smiley, 16 Ala. 773;
Dent v. State, 42 Ala. 514;
Ops. Atty. Gen. 1918-20, p. 255;
Sec. 3734, Code of Alabama, 1923.

There is no provision of law for the payment of the damage here considered from the fine and forfeiture fund. There is no provision of the law for the State to pay said damages from any other fund.

However, I am of the opinion that the person injured should be paid one half of the proceeds the county receives from the convicts labor which he performs while working out the fine. If the county receives nothing for the convicts labor the injured party is entitled to nothing.

Reports Atty. Gen. 1924-26, p. 314,
Greene County vs. Hale, 61 Ala. 72,
Report of Atty. Gen. 1924-26, p. 336,
Op. Atty. Gen. Vol. 3, p. 157 (Office Ed).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 11, 1929.

Board of Revenue,
Columbiana, Shelby County, Alabama.

Non-support: County only liable to dependents of one convicted and sentenced to hard labor for non-support where it actually receives from the convict's labor the amount ordered to be paid his dependents.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of February 6, 1929.

You state that one was convicted and sentenced to hard labor for non-support of his dependents and that Shelby County was ordered to pay fifty cents a day toward the support of such dependents so long as the convict is confined at hard labor. You also state that your county has received nothing for the hire of this convict to the State Board of Administration and will receive nothing, for that there will be a deficit from the maintenance of the convict and that there are no net earnings to which the county is or will be entitled.

You inquire whether or not your county must pay to the dependents of the convict the fifty cents per day, in view of your statement of the facts.

I am of the opinion that Shelby County is not required to pay the dependents of the convict unless it actually receives from the hire of the convict a sufficient sum to pay the sum ordered.

Reports Atty. Gen. 1924-26, p. 314,
Reports Atty. Gen. 1924-26, p. 336.

This office has heretofore taken the identical position here taken.

Opinions Atty. Gen. (Office Ed.) Vol. 2, p. 229, of date June 28, 1927,
to Director of Child Welfare Dept.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 11, 1929.

Superintendent of Education,
State of Alabama,
CAPITOL.

Eminent Domain: Alabama Institute for Deaf & Blind may institute condemnation proceedings to acquire lands necessary for the purposes of the school.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of January 25th, 1929, in which you enclose a letter from the Chairman of the Executive Committee of the Alabama Institute for the Deaf and Blind.

This gentleman mentions the fact that the Executive Committee of this Institute desires to acquire a certain lot contiguous to other land owned by the Institute. I assume that this property is necessary and useful to the purpose of the school.

You request me to inform you whether or not the Institute may condemn this lot for school purposes.

I am of the opinion that the Alabama Institute for the Deaf and Blind may institute condemnation proceedings to acquire the lot in question if its acquisition is necessary to and useful for school purposes.

Lands may be condemned for school purposes, that is to erect school buildings or play grounds.

Oakland Ind. School Dist. vs. Hewitt 75 N. W. 497,
State vs. Chelon Co. Supt. 124 Pac 484.

A School Board may condemn lands for the purposes of enlarging a school site upon which buildings have been erected.

In Re Springboro School Dist. 21 Pa Co 23.

The above cited cases hold that the condemnation of land for school purposes is for **public** uses.

It is provided that the State, a municipality thereof or a corporation organized under the laws of this State may institute condemnation proceedings to acquire lands for any uses for which private property may be taken.

Section 7476 Code of 1923.

The Alabama Institute for the Deaf and Blind is an arm or instrumentality of the State.

This Institute is made a body corporate and by its name may sue, **acquire** and hold real estate.

Sect. 577 Alabama School Code of 1927, p. 204.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 11, 1929.

The State Fire Marshal,
CAPITOL.

Construction of Section 975, Code 1923, with reference to use of books, papers or documents when produced.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of October 4th is acknowledged. You wish my opinion upon the following facts:

The State Fire Marshal, or his deputy, in making an investigation into some matter as required of him by Chapter 27 of Code 1923, of which Section 975 forms part, has required some person or persons as provided by said Section, to produce books which he, the Fire Marshal or his deputy, deems necessary for such investigation and pertinent to the matters being inquired about. You wish to know, whether or not, when such books have been produced, you may have an audit made of such books.

In reply to your inquiry will say that, in cases where you are entitled to the production of any book, paper or document deemed pertinent to the subject of inquiry and investigation which you are authorized to make under Chapter 27 of the Code, 1923, you, may, when such book, paper or document shall have been produced, make such use of the book, paper or document as will reasonably effectuate the purpose for which the production is required.

It will be well to keep in mind, however, that where such investigation is for preliminary inquisition of one not yet charged with an offense, the privilege against self incrimination, provided by section 6 of the Constitution of the State of Alabama, applies to the production of private books, papers and documents by individuals, who own and possess the same.

Wigmore on Evidence, 2nd Edition, Sec. 2251.

It does not apply to books, papers or documents of corporations.

Hale v. Henkel, 201 U. S. 44;

Wheeler v. United States, 226 U. S. pp. 478, 482.

Such inquisitions constitute a high exercise of police power, and should be judiciously exercised, strictly for the purposes comprehended in said Chapter 27 of Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 13, 1929.

Register in Chancery,
Andalusia, Alabama.

Typewriter—county must purchase for use of Register in Chancery.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 31, 1929.

You request my opinion:

May the county legally furnish the Register in Chancery with a typewriter and pay for the same out of county funds?

In answer to your inquiry, I advise you that it is the duty of the court of county commissioners, board of revenue, or like governing body, to furnish the Register in Chancery with a typewriter for his official use.

Section 6512, Code of Alabama, 1923, provides that:

"The court of county commissioners must allow to the registers the amounts properly expended by them for books and stationery, for the use of their offices."

Section 9604, Code of Alabama, 1923, as amended September 6, 1927, (Gen. Acts 1927, p. 693) provides as follows:

"The Judge of Probate, Tax Assessor, Tax Collector, **Register of the Circuit Court in Equity**, Clerk of the Circuit Court, Sheriff and the County Treasurer or Custodian must be allowed reasonable expenses, for suitable books, **stationery**, postage stamps used exclusively for official business, and telephones to be paid for by the County, on the approval of the Court of County Commissioners, Board of Revenue or other like governing body, and the seal of office, to be paid for by the county."

Section 9604 as amended, being the last expression of the Legislature on the subject, and covering the same and additional subjects more specifically should be strictly followed as to method of obtaining the things allowed.

The Supreme Court of Alabama has held that the word "stationery" as used in the above statute and kindred statutes, means, and includes typewriters.

Crook v. Commissioners Court, 144 Ala. 505;
Opinions Attorney General, 1910-12, p. 220;
Opinions Attorney General, 1918-20, p. 105;
Opinions of Attorney General, 1926-27, Vol. 1, p. 297 (Office Edition.)

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 13, 1929.

Chairman, Board of Revenue,

Evergreen, Conecuh County, Alabama.

County Physician—The County Board of Revenue not required to retain a County Physician to prescribe for inmates of County Poor House where the County may avail itself of the services of the County Health Officer.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of January 18, 1929.

You state that Conecuh County has recently established an all time health unit for your County, and that there has been elected a County Health Officer. You also state that your county is not caring for its paupers in conjunction with any other County as it might do under Section 33, of an Act approved September 9, 1927 (General Acts, 1927, p. 530).

You inquire whether or not you must employ a County Physician to treat the inmates of the County jail and poor house, or to prescribe for them, or whether or not the County may avail itself of the services of the County Health Officer in this respect.

I am of the opinion that where a County establishes an all time health unit and elects a County Health Officer the Board of Revenue of such county may dispense with the services of a County Physician and may avail itself of the services of the County Health Officer to treat and prescribe for the inmates of the County Jail and Poor House.

Section 1 of an Act approved September 9, 1927 (General Acts 1927, p. 521) and Section 4823 of the Code of 1923, provide that the Board of Revenue of a County **may** employ physicians for the poor house if it deems it proper. There is nothing in the above mentioned Act which would **require** the Board of Revenue to employ a physician where it did not **think** one **necessary** in view of the fact that a County Health Officer would perform the necessary services.

It is made one of the duties of the County Health Officer to visit the county jail and poor house at certain intervals, while it is not specifically provided that he shall prescribe for or treat the inmates.

Section 1058, Code of Alabama, 1923, as amended by an Act approved September 9, 1927 (General Acts 1927, p. 775).

However, nothing in the above mentioned statute or the amendment thereto, prohibits the County Health Officer performing such services.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 14, 1929.

Hon. Charles Anderson,
Justice of the Peace,
Axis, Alabama.

Dear Sir:

Justice of Peace have final jurisdiction concurrently with County Court in prosecutions for vagrancy.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 6, 1929.

You request my opinion:

Does a Justice of the Peace have final jurisdiction in prosecutions for vagrancy?

In answer to your question, I am of the opinion that justices of the peace have jurisdiction concurrently with the County Court in prosecutions for vagrancy.

Section 3847 Code of Alabama, 1923.

State vs. Spurlock, 159 Ala. 122.

Davis vs. State, 153 Ala. 73.

Sneed vs. State, 157 Ala. 8.

Section 3847 of the Code supra, specifically confers jurisdiction upon justices of the peace in prosecutions for vagrancy. However, justices of the peace are confined to their respective precincts.

Code of Alabama 1923, Sec. 3846.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 18, 1929.

Clerk of Circuit Court,
Greenville, Butler County, Alabama.

Contempt of Court. No solicitor fee is provided for in event of conviction.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of February 9, 1929, in which you state a defendant stands charged with Contempt of Court in the County Court of your County.

Upon this statement you request the opinion of the Attorney General on the following question of law:

What solicitor's fee should be charged upon conviction?

I am of the opinion that there is no solicitor's fee provided for in cases tried for Contempt of Court in this State. Contempt of Court is neither classified under our law as a misdemeanor or felony. The punishment for contempt of Court is provided for in Section 3798 of the Code of Alabama, 1923, which is as follows:

"Punishments by the respective courts for contempt.—The courts of this state may punish for contempt by fine and imprisonment, one or both, as follows: The Supreme Court, by fine not exceeding one hundred dollars, and imprisonment not exceeding ten days; the circuit courts by fine not exceeding fifty dollars, and imprisonment not exceeding five days; the courts of probate and county courts and registers by fine of not exceeding twenty dollars and imprisonment not exceeding twenty-four hours; the courts of county commissioners, by fine not exceeding ten dollars, and imprisonment not exceeding six hours; and justices of the peace by fine of not exceeding six dollars, and imprisonment not exceeding six hours."

The above quoted section is a limitation both as to the amount of the fine and the duration of the imprisonment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 19, 1929.

Hon. J. F. Kitchens,
Justice of the Peace,
Newell, Alabama.

Justice of Peace after expiration of term of office is a de facto officer.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 11, 1929, in which you state that you are Justice of the Peace in your county and precinct.

You request my opinion:

Do I hold office until my successor is elected and qualified?

It is my opinion you do. Section 8700, Code of Alabama, 1923, is intended to regulate this and is as follows:

"Two justices for each precinct; term of office.—Within the limits of every election precinct there shall be two justices of the peace, elected as provided in the chapter on 'elections', who shall hold office for four years and until their successors are qualified."

You will note the above quoted section states "* * * who shall hold office for four years and until their successors are qualified." You are until your successor is elected or appointed and qualified, what is known under the

law as a de facto officer and your acts as such are just as valid and binding so far as all third parties are concerned as if you were a de jure officer.

See Section 2583, Code of Alabama, 1923.

Stephen vs. Davis, 39 Sou. 831.

Century Digest (9) Justice of Peace, Section 9 to 13.

A Notary Public cannot hold over after his term expires.

Op. February 15, 1929.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 20, 1929.

Judge of Probate,
Pike County,
Troy, Alabama.

Dear Sir:

Counties—Constitutional debt limit. Counties cannot levy gasoline tax.

Counties—pledge of current revenue.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 15, 1929, in which you state that Pike County's indebtedness is \$587,593.89, and that the valuation of its taxable property is \$11,276,119.00, and that the Constitutional debt limit is \$394,664.16. The excess being \$192,929.73. You further state that outstanding warrants have been issued against the gasoline excise tax fund in the sum of \$99,995.05, and other funds to the total sum of \$167,093.89.

You request my opinion:

1. Can the County Treasurer legally defer the payment of warrants already issued and registered, and allow the county to use the money, which would otherwise be used in payment of such registered warrants, for the repair of roads and bridges for the current year and several years to come?
2. Can the Court of County Commissioners levy a tax of one cent per gallon on gasoline without special legislation?
3. Can the gasoline tax be legally pledged before it is received?
4. Did the Court of County Commissioners have authority to pledge the gasoline tax during the year of 1928?

In answer to your first question, I am of the opinion that the County Treasurer cannot defer the payment of warrants legally issued in compliance with Chapter 270, Article 3 of the Code of Alabama 1923, notwithstanding the fact that your county has exceeded its constitutional debt limit.

Constitution 1901, Sec. 224.

Gunter vs. Hackworth, 182 Ala. 205,

Hagan vs. Limestone County, 160 Ala. 554,

Report of Attorney General, 1920-22, page 369,

Report of Attorney General, 1920-22, page 465,

Book 6 (Office Edition) page 204.

In answer to your second question, I am of the opinion that the Court of County Commissioners cannot levy a one cent gasoline tax, unless there is a local Act of the Legislature authorizing such a levy.

Opinion of the Attorney General Book 9 (Office Edition) page 122.

In answer to your third and fourth questions, I am of the opinion that the Court of County Commissioners could only pledge one half of the estimated income from the gasoline tax for the year of 1928.

Code of Alabama 1923, Sections 6776, 6777, 6778.

Under the first question submitted by you, the Treasurer is required to pay all warrants legally issued, Pike County having exceeded its Constitutional debt limit. Did the Court of County Commissioners in issuing said warrants comply with Sections 6776, 6777 and 6778 of the Code of Alabama 1923? In determining whether there was a compliance with the Code *supra*, it is necessary to construe Section 224 of the Constitution.

Prior to the Constitution of 1901 counties had, by necessary implication, the power to contract debts, though not to borrow money, in the execution of those purposes for which they were organized.

Simpson vs. Lauderdale County, 56 Ala. 64.

This power they still have, but within the limits laid down in the Constitution of 1901. The prohibition against indebtedness is generally construed to apply to indebtedness in all forms, however incurred, or for whatever purpose.

Hagan vs. Commissioners of Limestone County, 160 Ala. 544.

As was said in Hagan vs. Commissioners *supra*, the constitutional purpose "was to curb the improvident creation of debts by counties, and thus protect the taxpayers against excessive and unnecessary burdens". The prohibition against indebtedness under Section 224 of the Constitution, is generally construed to apply to indebtedness in all forms, however incurred, or for whatever purpose. The obvious intent of Section 224, *supra*, is to restrain counties from obtaining money either upon the general credit of the county, or by pledge or transfer of its revenue or assets, thereby creating a debt and imposing additional burdens upon the citizens, which, whether directly or indirectly, involve increased taxation. And the requirement is that whenever a county has reached the Constitutional limitation, it **must at once adopt the financial policy of paying as it goes.**

When Pike County reached the Constitutional debt limit then, it could only pledge one half of the county's income from taxation.

Code of Alabama 1923, Section 6777

Biennial Report of Attorney General 1918-1920, page 320.

And if Chapter 270, Article 3 of the Code of 1923, was not complied with then, the warrants so issued would not be legally issued.

Brown vs. Gay-Padgett Hdw. Co., 188 Ala. 423, 427,
Potts vs. Conecuh County, 203 Ala. 300.

Under the second question submitted by you, there is not any authority for a Court of County Commissioners in the State of Alabama, to levy a license tax upon the sale of gasoline, unless given by local law.

Under the third and fourth questions, the Court of County Commissioners cannot pledge the money derived from the gasoline tax for a period of time beyond the current year, i. e., 1928, and they could only pledge one half of that amount, based upon the amount received the preceding year. For example if the income derived for the year of 1927, amounted to \$50,000.00 the Court of County Commissioners could pledge only one half of that amount for the current year 1928, or the sum of \$25,000.00. And said amount, in that event, could only be pledged upon a strict compliance with Chapter 270, Article 3 of the Code of Alabama 1923, for that year.

Gunter vs. Hackworth, 182 Ala. 205,

Report of Attorney General, 1920-22 page 369, 456,

Opinion of Attorney General, Book 6 (Office Edition) p. 204.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 21, 1929.

The Superintendent of Education,
Hartselle, Morgan County, Alabama.

County Board of Education cannot pay for curb and gutter in front of high school property.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of December 14, 1928, in which you state that you have been requested by the County Board of Education to ask for an opinion as to the liability of the Board for an assessment against the county high school for curb and gutter laid by the State Highway Department along the front of the high school property. You state that the city is paying the assessment under protest and claiming that the County Board of Education should pay it. You also state that you have declined to pay this expense on the ground that state owned property is not taxable.

You request my opinion:

Can the County Board of Education legally pay for curb and gutter laid along the front of high school property?

In my opinion the County Board of Education cannot legally pay the above expense without violating the provisions of Section 91 of the Constitution of 1901.

Section 91 of the Constitution of 1901 provides that the Legislature cannot tax state or county property. Municipal corporations are a creation of the Legislature. It necessarily follows that municipal corporations nor any other agency of the state can tax state or county property without violating said Section 91 of the Constitution.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 21, 1929.

Hon. D. P. Burkett,
Justice of the Peace,
Pansey, Alabama.

Dear Sir:

Road Duty.—Minister not exempt.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of February 16, 1929, in which you request my opinion:

Is a minister of the Gospel exempt from public road duty?

Answering your inquiry, it is my opinion that a Minister of the Gospel is not exempt from public road duty.

Sections 163 and 164 of an Act approved August 23, 1927 (Acts 1927, pp. 393-394), commonly known as the Highway Code of Alabama, make provision for those persons liable to road duty and for those persons who are exempt.

Section 163 of said Act provides among other things, that all persons are liable to work on the public roads, except those exempted by the succeeding Section.

The succeeding Section 164 provides among other things as follows:

"All women, and all men under the age of eighteen and over the age of forty five years; all persons who have lost an arm or leg; and all persons who by nature or disease, are rendered incapable of hard labor, who shall procure a certificate of such incapacity from the county board of health, are exempt from working on the public roads, but where there is no county board of health, the certificate of such incapacity from two reputable practicing physicians shall be sufficient. * * *

There is no provision made in said Section 164 for the exemption of ministers of the gospel, and I find no other authority under the laws of Alabama providing for such exemption.

Opinions of Attorney General, 1928, Vol. 8, p. 132 (Office Edition)
Opinions of Attorney General, 1927, Vol. 1, p. 349 (Office Edition)
Opinions of Attorney General, 1927, Vol. 1, p. 439 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General

February 21, 1929.

The State Tax Commission,
CAPITOL.

Gentlemen:

License due from wholesale lumber and timber dealer.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 5, 1929.

You state that there are quite a few people in this state who buy timber lands, cut over said lands, and sell the logs to operators of saw mills not owned by themselves.

You request my opinion:

Are such persons who are wholesale dealers in logs, as above indicated, liable for the license under an Act approved Sept. 15, 1919 (Gen. Acts 1919, p. 438), designated as schedule 126?

In answer to your inquiry, it is my opinion that the business described by you does not come within the meaning and scope of schedule 126, of the Act approved Sept. 15, 1919 (General Acts 1919, p. 438). Said section reads as follows:

"Schedule 126. Exporter of Lumber,—for each exporter, **wholesale dealer**, as jobber of **lumber and timber**, and for each dealer in lumber and timber on commission, one hundred dollars."

"Lumber and timber" are used conjunctively in said schedule. "Timber" as used in said schedule further defines the meaning of "Lumber" as used therein. It is well known that certain grades of lumber are referred to as timber. Especially is this true of beams, spars, and heavy pieces of lumber.

Had the Legislature intended to cover the business of selling logs in the schedule here considered, it would have used the word "log".

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 21, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Fees: Sheriff is entitled to have his fees for arrests and guard fees charged against fine and forfeiture fund of county where prosecution was begun in Justice Court and defendant acquitted in Circuit Court. Sheriff is also entitled to fee for each bond approved. Sheriff not entitled to arrest fee where copies not executed by arresting defendant.

Opinion by Assistant Attorney General Knight.

This acknowledges receipt of your letter of December 20th.

You inquire whether or not a sheriff is entitled to a fee for making an arrest on process issuing out of Justice Court and whether or not such fee can be charged against the fine and forfeiture fund of the county, where defendant is acquitted in the Circuit Court. You also ask whether or not the sheriff is entitled to more than one fee for guarding a prisoner, and whether or not he is entitled to more than one fee for approving a bond.

I am of the opinion that the sheriff's fees in a preliminary hearing, that is his fee for guarding the prisoner and for the arrest made upon process issued by the magistrate, follow the case into the Circuit Court and are there taxed as other costs, in the event of an acquittal the same become a charge against the fine and forfeiture fund of the county.

McPherson v. Boylin, 76 Ala. 602.

Bilbo v. Drakeford, 78 Ala. 322.

Hawkins v. State, 124 Ala. 105.

Stone v. Holcombe, 197 Ala. 293.

I am also of the opinion that the sheriff is entitled to as many fees for arrests as he is required by law to make and does make. Of course, if under the circumstances there is no necessity for the issuance of a capias and the sheriff makes no arrest he is entitled to no fee.

Whether or not a capias should be issued depends entirely upon whether or not the prisoner is in actual custody or the bond made previous to the indictment was conditioned to secure the appearance of the defendant in the Circuit Court to answer the indictment. If the bond was not so conditioned and the prisoner not in actual custody another capias should be issued.

Section 3278, Code 1923.

An arrest upon such capias entitles the sheriff to another fee for arresting the defendant.

If the defendant be again arrested the sheriff is entitled to another guard fee. I am assuming that he was charged with a felony. Of course, the prisoner must have been lawfully committed in each instance. The Supreme Court has specifically held that the sheriff is entitled to a guard fee for arresting and committing a prisoner upon process issued out of Justice of the Peace Court.

Stone v. Holcombe, 197 Ala. 293.

Unless the defendant is convicted or charged with a felony, the sheriff is not entitled to a guard fee **unless** he is arrested and committed **after** an indictment.

Section 3741, Code 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 23, 1929.

The Adjutant General,
Montgomery, Alabama.

Printing, binding, stationery and office supplies for Military Department of State of Alabama.—Payment for.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of February 14, 1929.

You request my opinion:

May the following items, viz: printing and binding required by the Military Department, stationery, typewriters, office supplies, and postage required by said Department, legally be paid for from the State printing and binding fund, and other funds appropriated by the Legislature of 1927.

In answer to your inquiry, I advise you that Section 20 of an Act approved Sept. 9, 1927, (General Acts 1927, p. 575) provides that the Adjutant General's Department of the State of Alabama shall be furnished "furniture, stationery, postage, lights, telegraph and telephone service, and other proper and necessary expense, conveniences and clerical assistance, in the same manner and way as is furnished to the other State Departments."

The "manner and way" referred to in said Act is by requisition from the Adjutant General's Department upon the Board of Administration.

Section 43, Code of Alabama, 1923.

The State Board of Administration is vested with the control and authority over public printing and binding.

Section 48, Code of Alabama, 1923.

The items which you name are proper charges against the respective funds enumerated in Section 17 of an Act approved Sept. 7, 1927, (General Acts, 1927, p. 686).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 23, 1929.

Judge of Probate,
Vernon, Lamar County, Alabama.

Dear Sir:

Road Law—Local Acts 1923, Section 28 construed.

Opinion by Assistant Attorney General Haynes.

I have your letter of January 24, 1929, in which you state the local road law for Lamar County, Local Acts, 1923, page 25, Section 18, requires of each

and every person who hauls on, along or across the public roads or highways of said county for hire shall pay a privilege license.

You request my opinion:

Does this section apply to all public roads in Lamar County or does it only apply to public roads maintained by the county and not state highways?

I am of the opinion that it applies to all public roads of the county whether they be what is termed county roads or state highways. Section 28 of an Act approved February 10, 1923, Local Acts, 1923, page 19, says in part as follows:

"That each person, firm, association or corporation hauling logs, lumber or freight on, along or across the public roads or highways of Lamar County for hire, profit or compensation, and each person, firm, association or corporation engaged in hauling for hire, and each person, firm, association or corporation hauling freight, goods, wares or merchandise to be sold or offered for sale in the hauling of which any public road or highway in Lamar County is used shall pay the following privilege license for the use of said public roads or highways of said Lamar County, to-wit:."

It is my opinion that this Section part of which is quoted above was intended by the Legislature to cover all public roads whether maintained by the county or by the state. The statute does not mention county roads or state highway but they are designated as public roads or highways of Lamar County and this without exception. The state highway Act approved Aug. 23rd, 1927, (Acts 1927, p. 364) defines a highway as follows:

"Every way or place of whatever nature open to the use of the public, for purposes of vehicular travel. The term 'highway' shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities or other institutions".

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 23, 1929.

Dr. R. B. Archibald,
County Health Officer,
Andalusia, Covington County, Alabama.

Dear Sir:

County Board of Education—Authority to require vaccination of school children.

Opinion by Assistant Attorney General Koonce.

I have your letter of February 2, 1929, in which you state that the

question has arisen in your county as to responsibility for the vaccination of school children during an outbreak of small pox.

You request my opinion:

1. Has a County Board of Education power to require vaccination of children attending county schools?
2. Has a City Board of Education power to require vaccination of children attending city schools?
3. Has a local Board of Trustees the power to require vaccination of all children attending the school which is under their supervision?

In my opinion your first and second questions must be answered in the affirmative. In my opinion County Boards of Education in conjunction with the County Health Officers of such counties have authority to require the vaccination of all children who attend the public schools of the county. In my opinion the County Boards of Education in conjunction with the County Health Officers of such counties have authority to require the vaccination of all children attending the public schools of cities or towns unless such cities and towns have enacted ordinances as provided by Section 2047, Code of Alabama, 1923. Of course if said cities and towns have enacted ordinances as provided by said Section 2047, the vaccination of children attending the public schools of such cities and towns shall be governed by such ordinances.

Sections 619 to 625 inclusive, provide for the examination of school children and Section 625 provides for the cooperation of the County Health Officers and County Boards of Health in improving the health of the school children of Alabama.

Section 2047, Code of Alabama, 1923, provides for the adoption by municipal corporations of ordinances to prevent the introduction or spread of contagious, infectious, or pestilential diseases in the cities or towns, and to that end may provide for a system of compulsory vaccination and enforcement of the same.

The Supreme Court of Alabama upheld an ordinance passed under authority of the above Section 2047 in the case of *Herbert v. Demopolis School Board of Education*, 73 So. 321.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 25, 1929.

The State Tax Commission,
CAPITOL.

Attention: Hon. Jno. S. Mooring.

Dear Sir:

Schedule 80 of Section 361, Revenue Act 1919, Acts 1919, pages 425-426 construed as to last clause thereof.

Opinion by Assistant Attorney General Evans.

This is to acknowledge receipt of your letter of February 15, 1929.

You wish my opinion as to whether the words "raised by the seller", as used in Schedule 80 of Section 361 of the 1919 Revenue Act (Acts 1919, page 425 and 426), apply to fish, oysters and fresh meats.

In reply will say that, in my opinion, the words "raised by the seller" as used in the last clause of said schedule applies neither to fish, oysters, game, fresh meats or fruits. These are exempted by name and without qualification. With these are included as exempt from the license provided by said Schedule 80, "all farm products raised by the seller."

It would be illogical and contrary to proper rules of grammatical construction to make the words, "raised by the seller" apply to fruits in said clause and not apply to fish and game. Fish and game are not farm products, within the meaning of the laws of Alabama, and, hence it would be unreasonable to apply such qualification to fish and game.

In my opinion it was the legislative intent to exempt from the license required under said Schedule 80, fish, oysters, game, fresh meats and fruits and in addition thereto all farm products raised by the seller.

This conclusion is further strengthened by the fact that Schedule 56 of the same Act provides a license for peddling fruit.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 25, 1929.

Hon. John S. Mooring,
Assistant to State Tax Commission,
CAPITOL.

Dear Sir:

Where farm produce is sold from car on sidetrack of railroad, by the person who produced it, whether in person, or by agent, for his account, no license is required under Section 7½ of Revenue Act, 1927, (Acts 1927, p. 154).

Opinion by Assistant Attorney General Evans.

Receipt of your letter of February 15th, 1929, is acknowledged.

You make the following statement of facts:

A grower of oranges in Florida ships into Alabama, over a railroad, a car of oranges. The grower, or his agent for him, comes into Alabama for the purpose of selling the car of oranges and sells them at retail or wholesale from the car standing on side track, unloading track, spur track or other track of the railroad.

You wish to know, if, under the facts stated, a license would be due under Section 7½ of Revenue Act, 1927, (Acts 1927, p. 154).

In reply will say that, in my opinion, no license would be due under said Section 7½, under the facts stated by you.

Said Section 7½ reads as follows:

"Each person, firm, corporation or association, whether principal or agent, engaged in selling, either at wholesale or retail, fruits, vegetables, produce or other commodities, from cars standing on the side tracks, unloading tracks, spur track or any other track of any railroad or railway, shall pay the following privilege tax; * * * provided that the provisions of this section shall not apply to any person engaged in selling farm products or produce raised by himself," etc.

Where farm produce is sold by the person who raised it, whether in person or by his agent for him, such selling requires no license under said Section 7½. It is immaterial whether the farm produce is raised in the State of Alabama or some other State. No attempt is made in the Act to discriminate against produce raised out of the State of Alabama. In fact, no such discrimination could be made.

Vines v. State, 67 Ala. 73.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 25, 1929.

Hon. Alexander Blaikie,
Justice of the Peace,
Warrior, Alabama.

Dear Sir:

Justice of the Peace—

- (1) Use of Seal.
- (2) Jurisdiction in gaming cases.

Opinion by Assistant Attorney General Haynes.

I have your letter of February 9, 1929. You state that you are Justice of the Peace in your precinct.

You request my opinion:

- (1) Can I as Justice of the Peace use a seal?
- (2) Has a Justice of the Peace jurisdiction of gaming and gambling cases?

Answering your first inquiry will say I find no statute or law giving a Justice of the Peace authority to use a seal. He might use one if he so desired but I cannot see that it would give his official signature any more sanctity than if it was signed without seal. It is different with a Notary Public, ex officio Justice of Peace.

Section 9243, Code of Alabama, 1923, provides that all Notaries Public must be provided with a seal to be used for the authentication of their official act, but we have no such statute for Justices of the Peace. Of course, a

Notary Public with a power of the Justice of the Peace when using a seal would use it only as a Notary and not in connection with his official acts as a Justice of the Peace.

Answering your second inquiry you have no jurisdiction in gambling and gaming cases except where they come under Sunday violations such as Section 5539 and 5540, Code of Alabama, 1923, and you have this jurisdiction for the reason that Section 3845, Code of Alabama, 1923, gives Justices of the Peace jurisdiction of all Sunday violations.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 25, 1929.

Dr. C. A. Cary,
State Veterinarian of Alabama,
Auburn, Alabama.

Dear Sir:

Only animals, whose owner cannot be found by a State Live Stock Inspector, are estrays and subject to sale under Section 582 of the Agricultural Code, 1927.

A Deputy Solicitor has no authority or legal right to represent one resisting the enforcement of the tick eradication law.

When a Sheriff levies upon property under a writ of detinue he must follow the provisions of Section 7391, Code of Alabama, 1923, or be liable for all damages suffered by any one by his failure to do so.

Opinion by Assistant Attorney General Evans.

Your letter of February 9, 1929, is acknowledged. You state the following as facts:

Mr. G. W. Cameron, a Federal Live Stock Inspector, whose duties as such, are confined to Washington County, Alabama, gave orders to certain live stock inspectors of the State of Alabama, to seize any undipped cattle found on the tick infested range in Washington County and bring them to Chatom to the pound there established and deliver them to Mr. J. B. Powell, keeper of the pound. In pursuance of such order, said inspectors seized certain cattle belonging to one Alex Williams and delivered them into said pound. These cattle were duly marked in the mark of said Alex Williams, which mark was known to said State live stock inspectors.

These cattle were proceeded against as stray cattle in manner provided by Section 582 of the Agricultural Code, 1927. Such State live stock inspectors thereupon applied to a Justice of the Peace to have such animals condemned as estrays and sold at public auction. The Justice of the Peace thereupon proceeded to condemn said cattle as estrays as follows:

"State of Alabama,)
Washington County) Justice Court
Precinct 2.

"The State of Alabama,)
vs.) In the matter of the
Estray Cattle) estray by J. T. Dumas.

"This day came J. T. Dumas, Live Stock Inspector for Washington County, Alabama, and evidence being given by him as to the condition of (here describing the cattle) estrays.

"It is found by the Court that said cattle were found in a quarantined or tick infected range, commons, pasture or field and have not been dipped as provided by law, and it appearing to the Court from the evidence submitted that said Live Stock Inspector has found said cattle in a quarantined or tick infected range and has taken said cattle up as provided by said law.

"It is, therefore, ordered and adjudged by the Court that said animals are estrays under the law as provided by Section 582 of the Agricultural Code of the State of Alabama, and it is further ordered that said estray cattle be sold after being advertised as required by law. It is further ordered that said cattle be sold on the 9th day of February, 1929."

"After this order was made by the Justice of the Peace and advertisement had been made by the Justice of the Peace in the manner provided by said Section 582, the said Alex Williams brought suit in detinue against the said G. W. Cameron for said cattle and the Sheriff of the County took possession of said cattle under the writ of detinue issued out of the Circuit Court."

Under the facts as stated you ask the following questions:

1. Was G. W. Cameron, Inspector in charge for Washington County, legally in possession of the cattle?
2. What procedure should a Justice Court take to recover the cattle?
3. Has the Deputy Solicitor of Washington County a legal right to represent Alex Williams in said suit in detinue?
4. What is the position of the sheriff when, in such case, he takes such cattle from the pound, in a tick infested, quarantined area, under a writ of detinue and delivers them at once to plaintiff, said cattle being at the time under a specific quarantine issued by the State Live Stock Inspector?

In reply will say as follows:

In reply to question 1 will say that Section 582 of the Agricultural Code, 1927, applies only where the owner cannot be found by the live stock inspector. I find no authority for impounding cattle whose owner can be found by the live stock inspector, nor for condemning such cattle to sale.

Where the owner is known, and can be found, by the live stock inspector, the live stock inspector should proceed under Section 586 of said Agricultural Code, where the owner can be found by the live stock inspector the animal is not an estray under the provisions of said Section 582.

In answer to question 2 will say that under the facts stated, the Justice

Court can take no steps legally to recover the cattle in question, as such court was not legally in possession of them.

As to the proceeding provided for by said Section 582, the Justice of the Peace Court is a Court of special, limited, statutory jurisdiction and its jurisdiction does not attach until all facts necessary to give it jurisdiction is shown to it, and ascertained by it. In my opinion a valid order must state, in addition to what was stated by the Justice of the Peace Court in the case stated, that the owner of the animals named cannot be found by the inspector.

In answer to question 3, will say that, in proceedings to enforce the tick eradication law, the State is a party interested. Section 563 of said Agricultural Code provides that "a copy of the rules and regulations shall be furnished by the Commission to all * * * solicitors in all areas that might be affected by said rules and regulations immediately after their adoption by the State Board of Agriculture."

Section 5498 of Code, 1923, provides:

"It is the duty of every Circuit, County or other solicitor within the Circuit, County or other territory for which he is elected or appointed—3. To prosecute and defend any Civil action in the Circuit Court, in the prosecution or defense of which the State is interested."

From the above two sections it appears that it was the duty of the deputy solicitor to defend the interest of the State in enforcing its tick eradication law and not to take the side opposed to the State. I am, therefore, of the opinion that a deputy solicitor has no legal right to represent one resisting the enforcement of such law.

In answer to your fourth question will say that, in my opinion such sheriff in so doing has plainly violated his duty as prescribed by Section 7391 of the Code, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 26, 1929.

Treasurer,
Troy, Pike County, Alabama.

Dear Sir.

Counties—Payment of outstanding warrants.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 23, 1929, in which you state that there are outstanding warrants registered against the gasoline tax fund to the amount of \$99,995.05. You further state that there is approximately \$6,000.00 in the County Treasury to credit of the Gasoline excise tax fund, and the warrants for labor and other necessary items for the months of December 1928, January and February 1929, are unpaid.

You request my opinion:

1. Can the Treasurer legally pay the warrants for road hands, fuel, upkeep of machinery and timber necessary for repair and maintenance of roads and bridges for the named months, as well as such future items out of the money now credited to gasoline fund?

2. Can I as Treasurer legally defer the payment of the warrants heretofore registered against the gasoline excise tax fund, and are the warrants legally registered against that fund?

In answer to your first question, I am of the opinion that you as Treasurer, can legally pay the warrants for the months of December 1928, January and February 1929, for hire of road hands, fuel, upkeep of machinery and necessary timber purchased for maintenance of roads and bridges.

Brown vs. Gay-Padgett Hdw. Co., 188 Ala. 423.
Biennial Report of Atty. Gen. 1918-20, p. 320.

See Opinion to Judge of Probate, Pike County of Feb. 21, 1929, Book 9, Office Edition.

In answer to your second question, I am of the opinion that you as Treasurer of Pike County, can legally defer the payment of warrants registered against the gasoline excise tax fund.

See citation of authority under first question.

Under your first question, there is no doubt of your authority to pay the claims mentioned. Pike County must function as an arm of the government.—Brown vs. Gay-Padgett, supra, and in order for it to function, it must have the benefit of the money derived from the gasoline excise tax. That tax is levied for, and must be used only for the maintenance and repair of roads and bridges. That the paying of road hands, the purchase of fuel, necessary timber and upkeep of machinery, is maintenance of roads and bridges is uncontrovertible.

Under your second question, without a doubt you can defer such warrants as are registered against the gasoline tax fund. The State of Alabama levies that tax, the State collects that tax and says that it must be used for the maintenance of roads and bridges. And the Act under which the tax is levied and collected makes it a misdemeanor to use such income for purposes other than the repair and maintenance of roads and bridges. For example suppose the Legislature was to place the fund in the hands of the Highway Department, entirely taking it away from the counties. It would be within the Legislative competency. Again, the Legislature might repeal the tax. If so, what would become of the outstanding warrants registered against that fund? It is unnecessary for me to determine the legality of the outstanding registered warrants.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 26, 1929.

State Tax Commission,
Capitol.

Attention Mr. John S. Mooring.

Dear Sir:

License—Automobile dealers selling at public auction.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 13, 1929.

You state that an automobile dealer has accumulated an excessive stock of second hand cars, and that, desiring to dispose of his surplus stock, he holds an auction and advertises the same. Said dealer holds the auction, employing a regularly licensed auctioneer to conduct said auction.

You request my opinion:

Under the foregoing statement of facts, is said dealer liable for a license under Schedule 51 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 411)?

In answer to your inquiry, it is my opinion that the dealer is not due a license for conducting said sale.

The concluding portion of Schedule 51 of an Act approved September 15, 1919 (General Acts 1919, p. 411) expressly exempts from the operation thereof sales conducted by legally licensed auctioneers. The exemption reads as follows:

"But the provisions hereof shall not apply to bona fide sales, etc., or to regularly licensed auctioneers selling bona fide at public outcry in the usual course of their business."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 27, 1929.

Court of County Commissioners,
Tuscumbia, Colbert County, Alabama.

Dear Sir:

Courts of County Commissioners. Cannot purchase automobiles for use of their members to be used in the performance of their official duties.

Opinion by Special Assistant Attorney General Smith.

I have your letter of January 25, 1929, in which you state that the Court of County Commissioners of Colbert County are contemplating the purchase

of automobiles for each member of said Court to be used in the discharge of their official duties.

Upon this statement you request the opinion of the Attorney General on the following question of law:

Can the Court of County Commissioners of Colbert County, Alabama, legally purchase automobiles for each member of said Court to use in the discharge of his official duties?

In am of the opinion that there is no authority of law authorizing the Court of County Commissioners of this State to purchase automobiles for the use of each member of said Court to be used by them in the discharge of their official duties. Such purchase being neither expressly authorized by statute nor necessary to the performance of any governmental functions imposed on the members of said Court.

The policy long adopted in this State is that a County can incur no liability, make no contracts, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication, they have no powers except those which are necessary to the performance of the governmental functions imposed on them.

Mobile vs. Drago, 172 Ala. 155.

Naftel vs. Montgomery County, 127 Ala. 563.

Jack vs. Moore, 66 Ala. 184.

Biennial Report of Attorney General, 1918-20, p. 500.

The only theory upon which the Court of County Commissioners could possibly justify the purchase of automobiles for the use of its members in performing governmental functions would be for the inspection of roads and bridges, and in going to and returning from their courts. The mileage for performance of these duties are provided for in Section 6771, Code of Alabama, 1923, which is as follows:

"Compensation of County Commissioners.—Each member of the court of county commissioners and board of revenue in each of the several counties of the State of Alabama shall be paid out of the county treasury of their respective counties for their services the sum of three dollars per day while occupied in the discharge of their duties as such members of the court of county commissioners or board of revenue, and five cents per mile in going to and returning from their respective courts, and the sum of three dollars per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building, or repairing, of any county bridges, or county buildings or works, and five cents per mile for each mile necessarily traveled by them in so doing, said sums to be paid on warrants drawn on the county treasurer on the order of the court of county commissioners or boards of revenue. No allowance shall be made to any commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the Commissioners' court, previously made."

The travel required of members of the Court of County Commissioners in the discharge of their official duties is definitely provided for and mileage paid to the members of said Court for said travel. Therefore, the purchase of automobiles for use of members in the discharge of their duties cannot be justified as being necessary.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 28, 1929.

State Tax Commission,
Capitol.

Attention Mr. Jno. S. Mooring.

Gentlemen:

Motorcycles—Dealers tags for.

Opinion by Assistant Attorney General Brassell.

Receipt of your letter of February 21, 1929, regarding dealers tags for motorcycles.

You request my opinion:

Under Section 21 of the Act approved September 13, 1923, (Acts of 1923, p. 284), is the State Tax Commission required to furnish a dealers tag for motorcycle dealers?

In answer to your question, I am of the opinion that the State Tax Commission is required to furnish a dealers tag for motorcycle dealers.

See Section 21 of the Act approved September 13, 1923, (Gen. Acts Ala. 1923, p. 284).

Section 2 of the Act supra, defines motor vehicles which are self propelled. Section 21 of the Act states that before any dealer shall be permitted to operate upon the roads and street in the State of Alabama, such dealer shall apply to the State Tax Commission for dealer tags, **which shall be issued.**

A motorcycle is a motor vehicle.

3 Words & Phrases p. 462, 463.

It was the intent of the Legislature that dealers tags be provided by the State Tax Commission for all motor vehicles.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 28, 1929.

State Tax Commission,
Capitol.

Dear Sirs:

Transfer of license and tag for trucks provided for by Section 17 of Act No. 163, approved July 22, 1927, confined to truck for which exchange is made.

Opinion of June 12, 1928, to Judge of Probate, Mobile County, modified.

Opinion by Assistant Attorney General Evans.

Your letter of November 10, 1928, is acknowledged. You ask a reconsideration of the opinion sent out by this office of date June 12, 1928. In that opinion it was held that, under the provisions of Section 17 of Act No. 163, approved July 22, 1927, (Acts 1927, pages 157 and 158) the owner of a motor truck who has already obtained a license tag as provided by law may have such tag transferred to another person or another truck.

The provision in said Section 17 with reference to transfer of license tag reads as follows:

"Any owner of a motor truck who has already obtained a license or license tag as provided by law and who exchanges for another may obtain a transferred license tag or certificate in the same manner and upon the same terms and conditions upon payment of the same fee as do owners of automobiles when obtaining a transferred license or tag."

It will be seen from the foregoing that the privilege of obtaining a transferred license is confined to the owner of a truck who has obtained a license therefor and has exchanged such truck for another truck. The evident legislative intent was to authorize the transfer of his license from the truck for which it was obtained to the truck taken by him in exchange. That is the only transfer provided for. The language used is not reasonably capable of any other construction.

If the transfer to another person were intended the privilege would not be confined to those who had exchanged the truck, for which license had been obtained, for another truck, but would have been given to all owners who had obtained a license. In my opinion the transfer is not only confined to another truck, but to the truck taken in exchange.

To the extent above shown the opinion of June 12, 1928, to the Judge of Probate of Mobile County is modified.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 1, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
Capitol.

Dear Sir:

Courts of County Commissioners: No authority to relieve bank acting as county depository from the payment of amounts of interest accrued on daily balances of county funds in said bank.

Opinion by Assistant Attorney General Smith.

I have your letter of February 27, 1929, in which you submit the following statement of fact:

The Court of County Commissioners of Pike County acting under authority of Article 2, Vol. 1, Code of Alabama, 1923, p. 576, et seq., selected the bank of W. B. Folmar and Sons as County Depository for Pike County, the term of office under the agreement between the County of Pike and W. B. Folmar and Sons terminated January 1, 1929. This bank was selected by the Court of County Commissioners upon the condition that the said bank would pay the County three per centum interest on daily balances. You further state that the majority of the members of the Commissioners Court have expressed a disposition to relieve the bank of W. B. Folmar and Sons from the payment of the three per centum due the County on daily balances on money of Pike County on deposit with said bank acting as County Depository as per contract between the contracting parties.

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Is there any authority of law whereby the Court of County Commissioners can relieve the bank of W. B. Folmar and Sons of the amount that has accrued to the County under the agreement made between the Court of County Commissioners and the bank of W. B. Folmar and sons for amounts of money accrued on daily balances.

The selection of the bank of W. B. Folmar and Sons by the County Commissioners of Pike County was evidently made in accordance with Section 316 of the Code of Alabama, 1923, which is as follows:

"Depositories, how selected.—The board of revenue or court of county commissioners shall from sealed bids place the county funds, the bids being opened on the first Monday in December of each year, with such incorporated state or national bank in the several counties, as offers the highest rate of interest to the county on daily balances of bank deposits, such placing of said county funds to be for the period of the following calendar year."

This Section clearly provides that the Court of County Commisisoners shall from sealed bids made by incorporated State or National bank in the

county select a County Depository who offers the highest rate of interest to the County on daily balances of bank deposits, the period of said selection shall be for one year.

From the above statement of facts and the above cited statute I assume that the Court of County Commissioners of Pike County selected the bank of W. B. Folmar and Sons as County Depository for the year 1928, for the reason that said bank offered the highest rate of interest to the County on daily balances on county funds.

When the Court of County Commissioners selected said bank in compliance with the above cited statute, and the bank accepted and agreed to pay three per centum on daily balances and entered upon the discharge of its duties as County Depository, this became a valid and binding contract between Pike County and W. B. Folmar and Sons, the contract was for the year 1928, the contract has expired, and the three per centum on daily balances for said year has been definitely ascertained, and should be collected by the County as any other debt due the County.

I am unable to find any provision of law whereby the Court of County Commissioners can relieve said bank from the payment of the amounts accrued from daily balances on the County's money deposited with said bank as County Depository. I am therefore clearly of the opinion that the Court of County Commissioners cannot relieve W. B. Folmar and Sons from the payment of the money accrued to the County from daily balances under this valid and completed contract. To hold otherwise would simply mean nothing more or less than a gift of this amount of the county's money to the bank of W. B. Folmar and Sons.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 2, 1929.

The Judge of Probate,
Birmingham, Jefferson County, Alabama.

Dear Sir:

The amount of deed filing tax required by Section 21½ of Act No. 163, approved July 22, 1927, (Acts 1927, p. 163) is based upon the actual market value of the property conveyed by the deed.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of February 27, 1927, is acknowledged. You present for opinion a deed made by W. H. Sadler, Jr., as Special Master to Investment Banking Corporation conveying certain real estate; said sale and deed being made under decree of District Court U. S., the recited consideration being five hundred thousand dollars. You wish my opinion as to whether or not under Section 21½ of Revenue Act, 1927, you must require payment of filing tax based upon the recited consideration or whether you may hear evidence to show that the real value of the property conveyed was some less amount.

In reply will say that the filing tax, in every case, is based upon the real value of the property at the date of the execution of the deed. The recited consideration is only *prima facie* evidence of the true value. As matter of common knowledge, in foreclosure proceedings or sale to satisfy judgment, the price bid varies according to circumstances. The person offering such deed for record should furnish the Judge of Probate with full and satisfactory evidence showing the actual fair market value of the property conveyed, whether such value be more or less than the recited consideration. After the Judge of Probate has made investigation satisfactory to him, he should collect on the fair market value, as such property is usually sold.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 4, 1929.

Judge of Probate,
Houston County,
Dothan, Alabama.

Dear Sir:

Counties—temporary loans.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 19, 1929.

You request my opinion:

1. In making temporary loans, should the resolution of the Board of Commissioners provide that only Road and Bridge claims for labor and material be paid out of the amount received on such loan in anticipation of the $2\frac{1}{2}$ mill levy, and only claims for general purposes be paid out of the amount received in anticipation of the five mill levy?
2. Does Section 239 et seq., contemplate all sources of income, or just taxes as used in the language of the Code?
3. May any more than 50% of the anticipated taxes from the $2\frac{1}{2}$ mill levy, be placed to the credit of the Road and Bridge fund, if so, how shall such additional amount be arrived at?

In answer to your first question, I am of the opinion that under Chapter 270, Article 3 of the Code of Alabama 1923, that the resolution of the Court of County Commissioners or other governing body of the County, should state that, only the claims for labor and material be paid out of the income from the amount received in anticipation of the $2\frac{1}{2}$ mills levied for Roads and Bridges.

Littlejohn vs. Littlejohn, 195 Ala. 614.

Report of Atty. Gen., 1920-22, p. 369, 456.

Opinion of Attorney General, Book 6, (Office Edition) page 204.

In answer to your second question, I am of the opinion that Section 239 et seq., of the Code of 1923, should be construed in *pari materia* with

Sections 6776-77-78-79. And that only 50% of the estimated income from taxes for county purposes should be the construction placed on the Code Sections supra.

Gay-Padgett Hdw. Co., 188 Ala. 423.

Opinion of Attorney General to Judge of Probate, Pike County, Feb. 20, 1929.

In answer to your third question, I am of the opinion that, if the financial condition of your county warrants it, the court of county commissioners may supplement the Road and Bridge fund by a transfer of money from the general fund.

Code of Alabama 1923, Section 6755 et seq.

Under the first question submitted by you, it is to be borne in mind that the road and bridge tax of $2\frac{1}{2}$ mills is levied for a specific purpose, and can be used only for the purposes for which it was levied.

Littlejohn vs. Littlejohn, supra.

By the second inquiry, the court of county commissioners or other governing body of your county can only pledge 50% of the County's estimated income from county taxes under Section 6777 of the Code, supra.

If there is a surplus in the general fund, under your third question, the court of county commissioners could by resolution transfer any part of such surplus to the road and bridge fund.

Code 6755 et seq.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 5, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Counties—Poor houses established.

Act approved September 9, 1927, Acts 1927, p. 521, construction of.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 27th, 1929, in which my attention is invited to Local Act of 1919, p. 258, et seq. Also to an Act approved September 9, 1927, Acts 1927, p. 521.

You request my opinion:

Did the Act approved September 9, 1927, General Acts 1927, p. 521, repeal the Local Act of 1919 (Local Acts of 1919, p. 255) relating to poor houses established under the Local Act supra?

I answer to your question, I am of the opinion that paragraph 2, Article 2 of the Local Acts approved September 29, 1919, (Local Acts 1919, p. 258) was repealed by the Act approved September 9, 1927, (General Acts 1927, p. 521).

Paragraph 2 of Article 2 of the Local Act *supra*, provided that the Board of Revenue should make provision for the maintenance of the indigent persons of the county, and make appropriation for their care whether confined or not in the county almshouse.

Under the Act of 1927, *supra*, the Court of County Commissioners, or Board of Revenue, by Section 2, two or more counties may form a district for the joint maintenance of the indigent persons of such counties. Section 25 of the Act of 1927, *supra*, provides that paupers must reside in the county for six months prior to making application to the county for support.

It is evident that the Legislature intended that the law providing for the support of indigent persons should be made uniform throughout the State. And by Section 31 of the Act approved September 9, 1927, it was provided that the Court of County Commissioners, or Boards of Revenue, could not appropriate money for the support of paupers outside the county almshouse. Morgan County having established a poor house, the governing body of that County could not make an appropriation for the support of any indigent person who is not an inmate of the established poor house.

Section 45 of the Act of 1927, *supra*, repeals all laws in conflict with it, and it necessarily follows that, in so far as the case support and maintenance of indigent persons are concerned in Morgan County where a poor house has been established, said Local Act is repealed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 5, 1929.

Hon. T. D. Touart,
Judge Pro Tempore, Inferior Criminal Court,
Mobile, Alabama.

Dear Sir:

Feeding prisoners.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 26, 1929.

You request my opinion:

May the food furnished a defendant while he is incarcerated in jail be legally assessed and charged against him as a part of the cost of his case?

In answer to your inquiry, I advise you that such a charge would not be legal.

Food for prisoners in the county jail is paid for by the State.
Section 4827, Code of Alabama, 1923.

Section 4837, Code of Alabama, 1923, repeals all laws and parts of laws which are in conflict with Section 4827 supra.

"In no case shall any defendant, on conviction, be sentenced to hard labor for the payment of sheriff's feed for feeding him while in jail."

Ex parte State, 121 Ala. 327.

Opinions of Atty. Gen. 1927, Vol. 3, p. 351 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 6, 1929.

Mr. C. M. Pittman,
Tarrant City, Alabama.

Act No. 574, approved Sept. 2, 1927, unconstitutional and did not change or affect the law with reference to constables.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of October 19, 1928.

You make, in effect, the following statement:

You were nominated for constable of Precinct 11 of Jefferson County in the primary election, 1928, and have since been advised that the last legislature extended the present constables terms of office for two years.

You wish to be advised when you will assume the duties of the office after being elected in the November election.

In reply will say that, in my opinion, Act No. 574, approved Sept. 2, 1927, (Acts, 1927, page 670, 671) which undertook to extend said term of office, is unconstitutional and consequently void. Section 168 of the Constitution of the State of Alabama provides:

"In each precinct not lying within any city or incorporated town of more than fifteen hundred inhabitants, there shall be elected by the qualified electors of such precinct not exceeding two Justices of the Peace and one constable. Where one or more precincts lie within, or partly within a city or town having more than fifteen hundred inhabitants the legislature may provide by law for the election of not more than two Justices of the Peace, and one constable, for each such precinct, etc."

It will be seen from the foregoing that the Constitution provides that constables shall be elected by the people. Fixing the term of office and

compensation is left to the legislature, since they were not provided for by the constitution nor prohibited thereby.

Where the constitution of the State directs that certain officers shall be elected by the people and authorizes, or leaves it to, the legislature to fix the term of office and the time and manner of election; and after the term has been prescribed by legislative enactment and the office filled, an act extending the term of the incumbent is unconstitutional—22 Ruling Case Law, Section 249; Mechem on Public Officers, Section 387; *People vs. Bull*, 46 N. Y. 57; *People vs. McKinney*, 52 N. Y. 374. The matter is well stated in Vol. 22, R. C. L., Section 249, as follows:

"If the constitution of a State provides that certain offices shall be filled by the voters at an election at such times and in such manner as the legislature shall direct, and the legislature then fixes the time and manner of election, which accordingly takes place, the legislature cannot thereafter pass any law which will extend the term of the incumbent. Having acted once the power of the legislature is exhausted."

The office of constable in a constitutional office which the constitution provides shall be filled by election by the qualified electors of such precinct.

In accordance with the Section 168 of the Constitution of this State, Section 413 of the Code provides for election of a constable by the qualified electors of the precinct. Section 417 of the Code provides when constables shall be elected, viz: "On the first Tuesday after the first Monday in November 1908, and every fourth year thereafter."

Section 6794 of the Code provides:

"There is one constable for each election precinct in each county in the State, elected as provided in this Code, who holds office for four years from the first Monday after the second Tuesday in January next after his election, and until his successor is elected and qualified."

If you were elected at the November election, 1928, it is my opinion, you were entitled to take as of date above stated, since the act of the legislature attempting to extend the term of the then incumbent of the office was void.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 6, 1929.

The Judge of Probate,
Heflin, Cleburne County, Alabama.

Dear Sir:

Road Supervisor: May be compensated out of money derived by county from gasoline tax levied by State. Court of County Commissioners: Work done on order of Commissioners Court or Commis-

sioners and claim properly audited and allowed by Commissioners Court should be paid for by county, and may be paid out of the gasoline tax proceeds.—Claim for work done by nephew of County Commissioner not properly allowed: Minutes of Court sufficiently specific to authorize payment of per diem and mileage to Commissioner for inspecting bridges in certain precincts.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of February 2nd.

You state that the Court of County Commissioners of your county has employed a road supervisor pursuant to a Local Act approved August 22, 1927 (Local Acts 1927, p. 238). You also state that prior to this appointment certain work was done on the roads of your county by persons authorized by Commissioners and that the claims have been audited and allowed by the Commissioners Court subsequent to the employment of the supervisor. You also state that necessary work was done upon the roads of your county by persons employed, however, one of the persons so employed was a nephew of a Commissioner who authorized the work. You also state that the Court of County Commissioners by an order spread up its minutes directed certain Commissioners to inspect certain work and bridges at certain intervals.

You inquire:

(1) May the Road Supervisor of Cleburne County be paid out of monies derived by the county from the excise tax levied upon the dealers in gasoline?

(2) Whether or not you may use the "gasoline tax fund" to pay for work done prior to the appointment of a road supervisor but where the claim was allowed by the Commissioners Court since the appointment.

(3) Whether or not you may pay for work done by a nephew of the Commissioner authorizing the work to be done.

(4) Whether or not an order spread upon the minutes of the Commissioners to inspect certain work and bridges is sufficiently specific to authorize payment therefor.

Answering your first question I am of the opinion that the money derived from the gasoline tax may be used to compensate the Road Supervisor.

Road supervision is an incident to the maintenance and upkeep of the roads.

The county's share of the money derived from the gasoline tax must be expended exclusively on the maintenance of the roads and bridges of the county.

Act approved Aug. 22, 1923 (Gen. Acts 1923, p. 197).

In answer to your second question it is my opinion that the appointment of a Road Supervisor does not affect the right or obligation to pay for work done in maintaining roads prior to his appointment. The proceeds of the gasoline tax may be used for this purpose.

Answering your third question I will state that you are without authority to pay for work done on the roads by a nephew of a County Commissioner who ordered the work done. The Court is without authority to enter into a contract with such a relative of a member of the court.

Section 5076, Code of 1923,
Opinion Atty. Gen. (Office Ed.), Vol. 3, p. 194.

As to your fourth question, I am of the opinion that an order of the Court spread upon the minutes authorizing a Commissioner at certain times to inspect certain road work in certain territory is sufficiently specific to entitle the Commissioner to the per diem and mileage provided.

Section 6771, Code 1923.

I am aware of the former opinion of this office, Opinions Attorney General, Vol. 8, p. 181 (Office Ed.), which holds that a resolution of years standing not at all definite nor specific furnished no authority for such payment, but the resolution in the instant case is much more specific.

All the expenditures mentioned by you appear to be for the maintenance and upkeep of the roads and bridges of your county and where the same are legal the claims may be paid out of the money derived from the gasoline tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 6, 1929.

The Superintendent of Education,
Wedowee, Randolph County, Ala.

Dear Sir:

Incidental fees—amount that may be charged. Incidental fees—use of.

Opinion by Assistant Attorney General Koonce.

I have your letter of February 26, 1929. You request my opinion:

1. What amount of incidental fees can be charged, and what can same be used for?
2. Can incidental fees be charged to help pay for an additional room to a school building which has already been constructed?

In my opinion, the board of school trustees, with the approval of the county board of education, can fix such incidental fee as they deem advisable. The only limitation placed by law upon such fee is that it must be reasonable.

In my opinion, incidental fees cannot be used for the purpose of paying for an additional room to a school building which has already been constructed.

Section 182, School Code, 1927, provides that the board of school trus-

tees shall have the power, with the approval of the county board of education to fix and collect a reasonable incidental fee to be paid by each pupil. Said Section further provides that the money so collected shall be used for repairs, improvement of grounds, insurance and other incidental expenses.

Section 184, School Code, 1927, provides for the care of buildings and grounds and other school property.

Section 218, School Code, 1927, provides for incidental fees in city schools.

I rendered an opinion on June 22, 1927, to the county superintendent of education of Morgan County (Vol. 2, p. 217, Office Edition) in which I held that incidental fees cannot be used for the purpose of paying teachers salaries. Said opinion contains the following definition of "incidental" which definition is found in Webster's Dictionary:

"Related to but not strictly a part of, the main thing or matter under consideration."

I also cited the following cases in said opinion:

Bryant v. Whisenant, 167 Ala. 325;

Roberson v. Oliver, 189 Ala. 82, 66 So. 645;

Williams v. Smith, 192 Ala. 428, 68 So. 323;

Ryan v. Sawyer, 196 Ala. 69, 70 So. 652.

The above cases contain a discussion of the meaning of the terms "incidental fees."

I held in the opinion which I have just referred to, that in my opinion incidental fees collected in a public school can be used only for the maintenance of school buildings and grounds, that is, providing heat, light, water, and keeping them in proper repair, and that when the fee is devoted to any other use, it is devoted to the main thing as distinguished from the incidental thing. Examination of the above sections of the School Code of 1927 and of the cases cited above, will disclose that such action is not authorized by law. Clearly, the addition of a room to a school building is the doing of a main thing as distinguished from an incidental thing. Payment of the expenses of such addition could not, therefore, in my opinion, be considered incidental expenses.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 7, 1929.

Mr. M. J. Jackson,
Justice of the Peace,
Livingston, Ala.

Dear Sir:

Justices of the Peace—county not liable for premium on bond.
Justice of Peace—can furnish bond with personal sureties. Justice of Peace—entitled to copies of the Code.

Opinion by Assistant Attorney General Koonce.

I have your letter of January 23, 1929.

You request my opinion:

1. Does the county pay for premiums on the bonds of justices of the peace?

2. Can justices of the peace make bonds with personal sureties? And if so, how many sureties are necessary?

3. Are justices of the peace entitled to the Code of Alabama free?

In my opinion the county does not pay for premiums on the bonds of justices of the peace.

In my opinion justices of the peace can make bonds with personal sureties, and in my opinion, at least two sureties are necessary.

In my opinion justices of the peace are entitled to the Codes of Alabama free. If your predecessor in office did not have a set of Codes, you should make application to the probate judge of your county for same, as provided by Section 794, Code of Alabama, 1923.

Section 8703, Code of Alabama, 1923, provides for the execution of a bond for justices of the peace to be approved by the judge of probate. Said Section does not specify the number of sureties required on said bond, but it is customary to have at least two sureties.

The Attorney General rendered an opinion on March 13, 1925, to the judge of probate of Madison County, in which he held that the county could not legally pay the premium on the bond of a justice of the peace, because a justice of the peace is a precinct officer and not a county officer.

Opinions of Attorney General, 1925, Vol. 1, p. 143.

The Attorney General rendered an opinion on December 7, 1928, to the Chief Examiner, Department of Examiners of Accounts, in which he held that justices of the peace are not county officers, within the meaning of the statute relating to payment of premiums on bonds, and that for that reason, counties are not liable for the premiums on the bonds furnished by justices of the peace.

Opinions of Attorney General, 1928, Vol. 8, p. 234 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 7, 1929.

The Sheriff,
Huntsville, Madison County, Alabama.

Dear Sir:

Act No. 99, House Bill 185, Acts 1927, page 73—Construction of.

Opinion by Assistant Attorney General Brassell.

I have your letter of March 30, 1928, in which you invite my attention to the constitutionality of an Act which became a law under Section 125 of the Constitution of 1901 (General Acts 1927, p. 73), which Act reads as follows:

"Section 1. That the Sheriffs in all counties in this State which now have, or which may hereafter have a population of fifty thousand people and less than fifty-four thousand people, according to the last Federal Census, or any such census which may hereafter be taken, shall be paid for impanelling grand juries, advertising and attending all elections in his county and for performing all other public services required of him, for which no compensation is allowed or provided for, as Ex Officio fees, such sums as may be just, to be allowed by the County Commissioners Court, or other governing body of such Counties, upon presentation of a verified account showing the items of service rendered, to be paid out of the general funds of the several counties affected, not to exceed twenty-four hundred (\$2,400.00) dollars per annum; but any sheriff whose annual income from fees of office exceeds five thousand dollars net after all expenses have been paid by him, shall not be entitled to any Ex Officio allowances as herein provided."

You request my opinion:

Is the Act violative of Section 96 of the Constitution or any other Section thereof?

In answer to your question I am of the opinion that the Act violates Section 96 of the Constitution.

Vaughan, Probate Judge v. State ex rel Parker, 103 So. 38, 212 Ala. 461.

Jackson, Clerk, v. Sherrod, Deputy Solicitor, 207 Ala. 245.

County of Mobile v. Pat Byrne, 117 So. 83.

Brandon v. Askew, 172 Ala. 160.

Waldrop v. Henry, 92 So. 425.

Osburn v. Henry, 200 Ala. 353.

Section 96 of the Constitution reads as follows:

"Sec. 96. The Legislature shall not enact any law **not applicable to all the counties in the State**, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

The purpose and intent of this section of the Constitution was to prevent the legislature from granting extra costs, charges of court, fees, commissions, or allowances, to a public officer which should not be enjoyed, alike by the officers of that class or character in each and every county of the State.

While said Section of the Constitution says nothing about ex-officio fees or allowances, the inhibition would apply equally to the enactment of laws which have as their purpose the regulating of such matters in one or more counties differently from the remaining counties of the State.

In this connection see Vaughan v. State, 103 So. 38:

"It seems not open to reasonable doubt that ex-officio fees * * * are among the fees and allowances named in Section 96."

It was because of this very section of the Constitution that the Constitution was amended by that amendment proclaimed ratified Nov. 16, 1912, which gave to the legislature the power in this regard, to treat Jefferson County differently from the other counties of the State in so far as Section 96 of the Constitution relating to **county** officers therein.

Discussing said amendment in *Osburn v. Henry*, *supra*, the Supreme Court said:

"The principle of uniformity, throughout the several counties of the State, as to the compensation of public officers in the way of costs, charges of courts, fees, commissions, and allowances, is declared also by Section 96 of the Constitution."

Section 96 of the Constitution deals with a specific subject—court costs and officers' fees and allowances, the officers affected are county officers. It declares that laws dealing with the subject must be "applicable to all the counties of the State." It must be considered a cumulative provision, extending and making more specific Sections 110 and 104 (24) as applied to the subject matter of Section 96. Any other view leaves Section 96 a dead letter.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 7, 1929.

Hon. L. G. Hendon,
Superintendent Child Welfare Dept.,
Wedowee, Randolph County, Alabama.

Dear Sir:

The Sheriff—serves warrants on parents of delinquent children; fees allowed for such services.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 16, 1929.

You request my opinion:

1. Under the present compulsory school law, is it the duty of the sheriff to serve warrants on parents or guardians of delinquent children?
2. What fees are allowed the sheriff for such service?

In answer to your first question, I advise you that it is the duty of the sheriff to serve warrants on parents or guardians of delinquent children.

Chapter 100, Code of Alabama, 1923.
Code of Alabama, 1923, Section 3558.

In answer to your second question I am of the opinion that the sheriff is entitled to the same fees as are now allowed, and paid for like services with respect to process issued by the Circuit Courts or courts of like jurisdiction.

Code of Alabama, 1923, Section 3558, supra.

Under Chapter 100 of the Code supra, it is incumbent upon the Juvenile Court to enforce the provision of the compulsory school attendance law. That being the case, it is the duty of the sheriff to serve the process of said Court.

Under your second question whenever the sheriff is directed by the Judge of the Juvenile Court to serve any of its process he in that event is entitled to receive the same fees payable in the same manner, and from the same source, as are now allowed and paid for like services with respect to process issued by the Circuit Court.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Tax Collector,
Jasper, Walker County, Alabama.

March 8, 1929.

Dear Sir:

Typewriter—County must purchase for use of Tax Collector

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 16, 1929.

You request my opinion:

May the county legally furnish the Tax Collector with a typewriter and pay for the same out of county funds?

In answer to your inquiry I advise you that it is the duty of the court of county commissioners, board of revenue, or like governing body, to furnish the Tax Collector with a typewriter for his official use.

Section 9604, Code of Alabama, 1923, as amended September 6, 1927, (General Acts 1927, p. 693) provides as follows:

"The Judge of Probate, Tax Assessor, **Tax Collector**, Register of the Circuit Court in Equity, Clerk of the Circuit Court, Sheriff and the County Treasurer or custodian **must be allowed** reasonable expenses for suitable books, **stationery**, postage stamps used exclusively for official business, and telephones **to be paid for by the county**, on the approval of the Court of County Commissioners, Board of Revenue or other like governing body, and the seal of office, to be paid for by the county."

The Supreme Court of Alabama has held that the word "stationery" as used in the foregoing statute and kindred statutes, means and includes typewriters.

Crook v. Commissioner's Court, 114 Ala. 505;

Opinion Attorney General, 1910-12, p. 220;

Opinion Attorney General, 1926-27, Vol. I, p. 297 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 8, 1929.

Judge of Probate,
Wetumpka, Elmore County, Alabama.

Dear Sir:

Extradition—payment of expenses.
Opinion by Assistant Attorney General Koonce.

I have your letter of February 25, 1929.

You request my opinion:

Is the Court of County Commissioners authorized to pay the expenses of the sheriff in bringing a prisoner from another State where the prisoner is convicted and sent to serve his sentence and the convict department does not pay the expenses of bringing him back from the other state?

In my opinion the Court of County Commissioners is not authorized to pay the above expense unless there be an express provision of law for such payment. You do not state in your letter the nature of the offense for which defendant was convicted so it is not possible for me to advise you if the County Commissioners are authorized to pay the expense of returning him to this State from another State.

If the defendant mentioned in your letter was charged with and convicted of murder then the Court of County Commissioners would not be authorized to pay the expense of returning him to this State from another State. I rendered an opinion on April 19, 1928, to the County Treasurer of Fayette County, (Vol. 5, Office Edition, p. 151) in which I held that there is no authority of law for the payment by a Court of County Commissioners of the expense of returning a prisoner, charged with murder, to this State.

If the man mentioned by you was convicted for abandonment of his wife or children, the Court of County Commissioners has authority to pay the expense of bringing him back to this State. Section 4491, Code of Alabama, 1923, contains authority for such payment.

If the foregoing does not contain the information which you desire I am sure that it will enable you to find the answer to your question through examination of the Acts and the Code of 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 8, 1929.

Clerk of Circuit Court,
Fayette, Alabama.

Dear Sir:

Solicitor's fee—Concealed weapon.

Opinion by Assistant Attorney General Brassell.

I have your letter of March 2, 1929.

You request my opinion:

Where the Solicitor has charged in one affidavit four offenses, viz., violating the prohibition law, carrying a concealed weapon, public drunkenness and maliciously destroying personal property, the defendant being convicted of the offenses of carrying concealed weapon, and for destroying personal property, should two solicitors' fees be taxed?

In answer to your question, I am of the opinion that, where a defendant is charged with four different offenses, all embraced in the same affidavit, you can collect only one solicitor's fee, viz., \$30.00 for carrying a concealed weapon.

Report of Atty. Gen. 1920-22, p. 429.

Section 4546 of the Code of Alabama 1923, provides that, when offenses are of the same character and subject to the same punishment the defendant may be charged with the commission of either in the same alternative.

It cannot be argued that the carrying of a concealed weapon, violating the prohibition law, public drunkenness and destroying personal property are kindred offenses. If a person is convicted only one Solicitor's fee is chargeable.

Connor vs. State, 19 Ala. App. 444.

Nelson vs. State, 15 Ala. App. 102.

Under the authority of the above cited cases such offenses as you mention cannot all be charged in the same affidavit.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 8, 1929.

Clerk, Circuit Court,
Chatom, Washington County, Alabama.

Dear Sir:

Solicitor's fee.

Opinion by Assistant Attorney General Haynes.

I am in receipt of your letter of February 26, 1929, in which you request my opinion as follows:

Please advise me what the solicitor's fee would be for a conviction under Section 48 and 49 of an Act of the Legislature approved August 26, 1927 (General Acts 1927, page 365).

Section 48 of the Act, *supra*, provides penalty for driving or operating a motor vehicle while under the influence of intoxicating liquor or narcotic drug.

Section 49 of the Act, *supra*, provides penalty for reckless driving of a motor vehicle.

I am unable to find any statute fixing the solicitor's fee for a conviction under either of the above sections. Each charge is a misdemeanor and it is my opinion that fee to be charged comes under Section 3738, Code of Alabama, 1923, page 196, which is in part as follows:

"For each conviction of a misdemeanor not otherwise provided for.....\$10.00."

It is my opinion that the solicitor's fee for a conviction under either Section 48 or 49 would be \$10.00.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 8, 1929.

Chief Examiner of Accounts,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Costs: State witness fees a proper charge against fine and forfeiture fund of the County.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of April 2, 1928, in which you request my opinion on the following questions of law, viz:

(1) Where a County receives no return for the hire of convicts to pay on the costs in which is included witness fees for State witnesses, and where execution has been issued and returned "No property found," would a witness be entitled to have his witness ticket registered as a claim against the fine and forfeiture fund of the County?

(2) Where a witness before the grand jury is issued a ticket for \$1.00 per diem in a felony case, and the defendant is sentenced to the penitentiary and the State pays to the County witness fees of only 75c per diem, is the balance of 25c per diem a proper charge against the fine and forfeiture fund in cases where execution is issued and returned no property found?

(3) Where a solvent defendant had worked out his costs for the number of days judicially ascertained, would there be any authority of

law to issue execution and require the said defendant to pay twice for the costs, once in cash and again in hard labor?

(4) Where a defendant has been sentenced to hard labor for a certain number of days judicially ascertained to pay the costs at the rate of 75c per day, no matter at what rate per day the county may have contracted for his services, is there any authority to issue an execution against the defendant to pay such costs?

(5) Where a defendant has failed to avail himself of the privilege of either paying fine and cost in cash or confessing judgment, and has chosen to discharge same by hard labor, would there be any authority to require a payment in cash collected on execution?

(6) County Commissioners being formerly charged with the duty of contracting for the hire of County Convicts, if a contract was made for a less price than 75c per day to pay costs, was there anything in the law to require the convict to pay the difference between the price provided by law and the lesser price?

(7) If a convict worked out the sentence of the court for payment of the fine, was there any authority of law to collect it from the defendant by execution?

(8) In penitentiary cases, is there any authority of law in the State to pay more than 75c per diem, and would 25c per diem be a proper charge against the fine and forfeiture fund where execution is issued and returned no property found or his 75c per day the limit a witness may receive for attending a penitentiary case, whether from the State or otherwise?

(9) Is there any authority of law for the clerk to issue an execution in a criminal case when a defendant is convicted of a misdemeanor unless the order of the court so directs?

(10) Is there any authority of law for the trial judge in a criminal case where the defendant is convicted of a misdemeanor, to order execution issued except where the defendant enters into a confession of judgment with sureties?

(11) Has the trial judge any authority to order execution issued in a case where a defendant, convicted of a misdemeanor, has failed to pay the fine and costs, or to confess judgment therefor, and the judge has sentenced the defendant under the provisions of Sections 5290, 5291 of the Code?

Replying to above questions seriatim, I beg to advise as follows:

The answer to first question is in the affirmative. I am of opinion that a State witness under the circumstances mentioned is entitled to have his witness certificate registered as a claim against fine and forfeiture fund of the County, notwithstanding the county received no return from the hire of the convict to pay on the cost. The right of the witness to have such registration is not made by the statute to depend upon what the county receives.

Code of Alabama 1923, Sections 3763, 3769.

Buggs vs. Coleman, 51 Ala. 561.

Lovelady vs. Copeland, 198 Ala. 625.

The answer to the second question is in the affirmative. Under the provisions of the statute it is the duty of the County Treasurer to file and register states witness certificates, and the fact that such witness certificates have been paid in part by the State out of the convict fund as provided by statute constitutes no excuse for the treasurer's refusal to file and register such certificate as a claim for the balance thereon, and upon his failure to so file and register the certificate he can be compelled thereto by mandamus.

Gray, Treasurer, etc. vs. Abbott, 130 Ala. 322.

The answer to the third question is no. Under the statute a convicted defendant may satisfy the judgment for costs against him in several ways, one of which is by performing hard labor for the county. Having been sentenced to serve a certain number of days at hard labor to pay his costs and having served out such sentence, he is entitled to be discharged from such sentence, and the costs having thus been paid, an execution could not then be issued against him. Only one payment could be exacted of him.

Code of Alabama 1923, Section 5291.

Report of Atty. Gen. 1920-22, p. 353 et seq.

The answer to the fourth question is found in Section 5291 of the Code of Alabama 1923. This section of the Code prescribes the rate to be allowed to a convicted defendant where he is sentenced to hard labor to pay the costs of the trial. This rate is mandatory; it is the minimum.

Isiah vs. State, 3 Ala. App. 138.

And if the defendant serves a sufficient number of days at said rate to pay costs, that is all that may be required of him.

The answer to the fifth question is in the affirmative. The mere election of a defendant to perform hard labor to pay costs would not prevent a judgment against him for such costs. Unless he had actually discharged the costs by his labor, an execution could be issued against him at any time for all of the costs or any part of it. It is only the hard labor actually performed by the convict that lessens his liability for costs.

In re: Pierce, 89 Ala. 177.

Clerk vs. State, 2 Ala. App. 196.

Report of Atty. Gen. 1920-22, p. 353.

The answer to the sixth question can be found in the answer to question number 4 supra.

The answer to the seventh question is no. Where a defendant has worked out his sentence to pay a fine imposed upon him, he could not thereafter be required to pay the fine and costs. The same observations made herein with reference to costs also apply to fines.

Code of Alabama 1923, Sections 5288, 5289, 5290, 5291.

The answer to the eighth question is to be found in Sections 3762 and 3667 of the Code of 1923. In Section 3762 the fees of witnesses are fixed.

Section 3667 which provides for the payment out of the convict fund to the County of certain items of cost does not by fixing 75c per diem as witness fees, affect said Section 3762. As shown in the answer to question No. 2 supra, the county is liable for the difference between the fee earned and the allowance made by the State.

See *Lovelady vs. Copeland*, supra.

The answer to the ninth question is no. Without a valid judgment for costs the clerk would be without authority to issue an execution therefor.

Report of Atty. Gen. 1920-22, p. 353.

The answer to the tenth question is yes. Confession of judgment for costs by a defendant is not a condition precedent to authority of the trial court to order the issuance of an execution, since confession of judgment may or may not be allowed by the court.

Code of Ala., 1923, Section 5288.

Boroen vs. State, 98 Ala. 83.

The answer to the eleventh question is in the affirmative. There being a valid judgment, execution for costs may be issued at any time before costs have been paid.

Report Attorney General, 1920-22, p. 353.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 8, 1929.

Superintendent of Child Welfare,
Clark County Child Welfare Board,
Grove Hill, Alabama.

Dear Sir:

Certificate from Bureau of Vital Statistics, State Board of Health is presumptive evidence of age of child.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 15, 1929.

You request my opinion:

In prosecutions for violations of Section 301-338, Alabama School Code, 1927, would the age of the child as recorded in the Bureau of Vital Statistics of the State Board of Health be presumptive evidence of the fact, or would the testimony of the parent as to the child's age be of greater weight than a certificate from the Bureau of Vital Statistics?

In answer to your inquiry, I advise you that a certificate from the Bureau of Vital Statistics is only prima facie evidence of the fact certified

to. Such a certificate may be considered along with other evidence, and is not conclusive of the fact. Should the oral testimony of the mother and father of the child be at variance with the certificate, then it becomes the duty of the court or jury trying the case to say which evidence they will believe.

Section 1087, Code of Alabama, 1923, as amended September 9, 1927, (General Acts 1927, p. 780) provides that, "Any such copy of the record of a birth or death, when properly certified by the State registrar, shall be prima facie evidence in all courts and places of the facts therein stated."

To like effect is Section 7674, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 9, 1929.

The Judge of Probate,
Cullman, Cullman County, Alabama.

Dear Sir:

Poll tax—When a naturalized citizen begins paying poll tax in order to vote.

Opinion by Assistant Attorney General Haynes.

I have your letter of February 11, 1929, addressed to Hon. Charles E. McCall, Chief Examiner of Accounts, which has been turned over to this office for reply. In your letter you state that one Mr. Schmitt came to this State from Germany about twelve years ago and was naturalized in 1926.

You request my opinion:

Under the law when is he required to begin paying poll tax in Alabama in order to vote?

It is my opinion he would have to begin paying poll tax, if he were over twenty-one and under forty-five years of age, from the date he became a citizen of the United States in order to be a qualified voter, and not from the time he took up his abode in Alabama.

Until he completes his naturalization he is a subject of the German Empire or German Republic. In other words until he becomes naturalized he occupies the same position as the citizen of the United States does before he becomes twenty-one years of age.

Garadi vs. Board of Registrars, of Jefferson County, 48 So. p. 785 ⁷⁸⁸

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 11, 1929.

The Chairman,
Board of Registrars,
Birmingham, Jefferson County, Ala.

Dear Sir:

Board of Registrars—Place of Meeting.

Opinion by Assistant Attorney General Brassell.

I have your letter of March 5, 1929.

You request my opinion:

Can the Board of Registrars of Jefferson County establish a branch office at the Courthouse at Bessemer, Alabama?

In answer to your question, I am of the opinion that under Section 403, Code of Alabama, 1923, as amended by an Act approved August 20, 1927, (General Acts, 1927, p. 274) in counties having a population of more than one hundred and fifty thousand according to the last or any succeeding Federal Census the Chairman of the Board of Registrars shall be furnished with an office at the courthouse in such county by the Board of Revenue or Board of like jurisdiction. In such counties where there is more than one courthouse the Board of Revenue, or Board of like jurisdiction, shall determine at which courthouse the office of the Board of Registrars shall be located. However, I find no authority of law for the establishing of a branch office by the Board of Registrars of Jefferson County.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Hon. A. C. Smith,
County Solicitor,
Clanton, Alabama.

March 12, 1929

Husband and wife—Extradition of husband for non-support.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of February 11, 1929, in which it is stated that a warrant of arrest for non-support has been issued for a man living in Louisiana. You further state that he was formerly domiciled in Chilton County, that he left for Louisiana to get an automobile, did not return and that his wife joined him in Louisiana and they lived together, she afterwards returning to Chilton County with his knowledge and consent.

You request my opinion:

Has the husband committed in Chilton County, a crime constructively or otherwise which would warrant extraditing him?

In answer to your question, I am of the opinion that under your statement of facts the defendant cannot be extradited for the crime of non-support.

Rearden vs. Rearden, 97 So. 138.

It is evident from the facts submitted the defendant is a resident of the State of Louisiana. To constitute residence but two elements are necessary, the act and the intention. 2 Words & Phrases, page 133 (NS). A man residing at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time is a resident of that place (State) within the meaning of the law.

Mitchell vs. United States, 21 Wall. (88 U. S.) 350, 22 L. Ed. 584.

As applied to the marriage relation residence means a home where the husband and wife dwell. It denotes the actual or constructive presence of a person in a given place, coupled with an intention to remain there permanently.

People ex rel Brooklyn Children's Aid Society vs. Hendrickson, 104 N. Y. Supp. 122, 124.

In the instant case from the facts submitted, the wife joined the husband and established their residence in the State of Louisiana, thereafter, she returns to the State of Alabama and makes affidavit that the husband is guilty of "non-support." Assuming for the sake of argument that he is guilty as charged. Was the crime committed in Alabama? I think not.

It is a general rule of universal acceptation that one state or sovereignty cannot enforce the penal laws of another, nor punish offenses committed in and against another State or sovereignty, and statutes are always to be construed in accordance with that principle. And of course, the State of Alabama has no power to punish a person for an offense committed in Louisiana.

16 C. J. page 149, Sec. 169.

The husband has the right to fix the domicile, and it is the duty of the wife to reside there.

Rearden vs. Rearden. *supra*.

Under the facts as outlined the crime, if committed, was committed in the State of Louisiana.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 15, 1929.

The Tax Collector,
Bay Minette, Baldwin County, Alabama.

Assessment to "estate of" or to "heirs of" descendant is irregular and will not support decree of sale so as to convey title to real estate to purchaser.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of February 13th, 1929, is acknowledged. You make the following statement of facts:

Real estate is assessed to heirs of John Doe or to estate of John Doe. The taxes are not paid, and no personal property can be found out of which, by sale, the taxes can be collected.

You wish my opinion as to whether or not, under such an assessment, the Probate Court can make a valid decree of sale of such real estate. In reply will say that, in my opinion, such an assessment is void and will not support a decree for sale of the property so assessed.

Jackson v. King, 82 Ala. 432.

Carlisle v. Watts, 67 Ala. 486.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 15, 1929.

The Tax Collector,
Livingston, Sumter County, Alabama.

When taxpayer dies after assessment of real estate and before paying the taxes assessed, and no executor or administrator has been appointed, the notice to be given before getting decree of sale of real estate from Probate Judge is provided by Section 244, of Act No. 328, approved September 15th, 1919, (Acts 1919, p. 354).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of February 13th, 1929, is acknowledged. You make the following statement of facts:

There was assessed to one Mary White of your County 40 acres of land. Since making the assessment the said Mary died leaving no will. She had no personal property. No administrator of her estate has been appointed.

You wish to know how you are to get the proper service before asking a decree for sale of said 40 acres of land to pay the taxes.

In reply will say please read Section 244 of Revenue Act 1919, (Acts 1919, p. 354). The method of giving the notice about which you ask is there plainly written.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 16, 1929.

The State Auditor,
State Capitol,
Montgomery, Alabama.

Feeding prisoners held for another state.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of February 19, 1928. You state that occasionally there appears on a sheriff's feed bill where some prisoner is held for a few days for another state, the said prisoner is finally delivered into the custody of an agent of another state.

You request my opinion:

Should I allow and pay for such feeding of a prisoner from other states than Alabama while said prisoners are confined in jails of counties in this state, awaiting delivery to other states? Or should sheriffs of the various counties collect these items from agents of other states before delivering such prisoners to said agents?

In answer to your inquiry, I advise you that you should allow and pay for such feeding of prisoners from other states.

Sections 4825-4837, both inclusive, Code of Alabama, 1923, govern the feeding of prisoners within the confines of the State of Alabama. In said statutes, nowhere is to be found a distinction as to prisoners of other states and prisoners of Alabama. That is to say, if a prisoner is legally committed to jail within the State of Alabama, he should be fed by the State without regard to "from whence he cometh or whither he goeth."

The sole criterion as to whether or not the State shall pay for the feeding of a prisoner is that the prisoner has been legally incarcerated in jail, and payment is not otherwise provided for.

Opinions of Attorney General, 1922-24, p. 65.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 20, 1929.

The Commissioner,
Department of Game and Fisheries,
CAPITOL.

Game and Fish—Construction of Act approved October 1, 1923, (Acts 1923, p. 795).

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of February 28, 1929.

You request my opinion:

Can the Department of Game and Fisheries use the money in the Game and Fish Protection Fund in the propagation and distribution of fish?

In answer to your question, I am of the opinion that the money which is now in the Game and Fish Protection Fund, can be used by the Commissioner of Game and Fisheries for the propagation and distribution of fish.

By the Act approved October 1, 1923, (General Acts 1923, p. 795) the Legislature revised Chapter 20, Code of 1907, relating to the Department of Game and Fisheries. Section 656 of the amended Act provides that the Commissioner of Game and Fisheries is vested with the power to enforce and administer all laws providing for the preservation, protection, propagation and development of wild birds, wild fur-bearing animals, game, fish and salt water fish. Section 666 of the Act *supra* is as follows:

"666. Commissioner to introduce birds, game and fish in desirable localities.—The Commissioner of Game and Fisheries shall have the power to introduce desirable species of birds, game and fish, and to cause the same to be distributed in such localities best suited to the habits of such birds, game and fish; and he may also under proper regulations cause to be planted resident game birds and animals in suitable localities within the State when such game birds or animals have become depleted or when new stock is desirable."

The Legislature by the quoted Section has made it the duty of the Commissioner of Game and Fisheries to introduce desirable species of birds, game and fish and to cause the same to be distributed in such localities as is best suited to the habits of such birds, game and fish as he may deem proper.

By an Act approved September 29, 1923, (General Acts 1923, p. 762) the Commissioner of Game and Fisheries is charged with the duty to acquire in fee simple or to make such other arrangements as may be found effective for the acquirement of such lands or tracts, streams, springs, water-courses or ponds as may be by him deemed suitable for the purpose, and thereupon he shall proceed to raise or propagate such quantities and species of edible game fish as are possible to raise. This Act provides for the establishment of a fish hatchery or fish hatcheries, and by Section 4 thereof the Legislature

provided that the fishing license fees and fines from fishing violations should be set aside, and known as the "Fish Hatchery Fund."

Section 11 of the Act approved September 29th, *supra* provides as follows:

"Sec. 11. That the Commissioner of Game and Fisheries is hereby authorized and empowered to enforce the provisions of this Act under the same regulations and in the same manner as any other game and fish laws are enforced in the State of Alabama, and all cases arising out of alleged violations of the provisions of this Act shall be tried in the same courts having jurisdiction in all misdemeanor cases."

Reading the two Acts it is evident that the general duties of the Commissioner of Game and Fisheries are the same under each Act. The Legislature having imposed the duty upon the Commissioner of Game and Fisheries to enforce all the laws relating to game and fish in this State, by the terms of the two Acts they should be construed *pari materia*. It will be observed that the two Acts were put through, signed and approved on the last day of the Legislative Session of 1923, and that it was the intent of the Legislature that the funds set apart, and to be known as the Game and Fish Protection Fund could be used in connection with the Fish Hatchery Fund. What the Legislature meant by the establishment of the two funds is that the Department of Game and Fisheries should be restricted to the revenues derived from the sources mentioned in the two said Acts, and that no part of the general fund of the State could be used for any of the purposes mentioned in the Acts *supra*.

Biennial Report of Attorney General, 1924-26, p. 66.

Under the Act approved October 1, 1923, the Commissioner of Game and Fisheries is charged with the duty to enforce and administer all laws for the preservation, protection, **propagation** and **development** of fish. How can fish be propagated or a fish hatchery established without funds for the propagation of fish? The Act of the Legislature which set up the Fish Hatchery Fund, Acts 1923, p. 762, in nowise conflicts with this interpretation. It provides for the acquiring of lands and suitable tracts, and the propagation of edible game fish, and creates a fund from the money arising from the violation of the fish laws, and for the sale of non-resident fishing licenses. It also provides that the expenses incurred by its provisions shall be limited to the amount of money to the credit of this fund, but that provision is intended solely to prevent indebtedness being charged against the general fund of the State, and is not intended to limit such work to the money solely in the Fish Hatchery Fund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 20, 1929.

The Probate Judge,
Wetumpka, Elmore County, Alabama.

Dear Sir:

Commissioners' Court—appropriation for ferry.

Opinion by Assistant Attorney General Rayburn.

I have your letter of March 13, 1929.

You request my opinion:

May the court of county commissioners legally make an appropriation for the establishment of a ferry, such appropriation to be applied to buying a motor and building a ferry boat when the tolls on such ferry will go entirely to the private individual who operates same.

In answer to your inquiry, I advise you that there is no authority of law for a court of county commissioners to appropriate money for the purpose of donating a ferry, automobile or other means of transportation to a private individual. However, the court of county commissioners has full authority to establish ferries for the county within the confines of the county, and may appropriate money for the purpose of buying the equipment for the conduct and management of such ferry.

Section 6443, Code of Alabama, 1923, clearly defines the powers and duties of commissioners' courts and boards of revenue to purchase, establish and maintain ferries.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 21, 1929.

Clerk of Circuit Court,
Talladega, Talladega County, Alabama.

Dear Sir:

Act approved September 20, 1919, (Gen'l Acts 1919, p. 531) construction of.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 20, 1929.

You request my opinion:

As Circuit Clerk am I entitled to the fees prescribed by the Act approved Sept. 20, 1919 (Gen'l Acts 1919, p. 531) in view of the decision of the Supreme Court in the case of the State ex rel Montgomery vs. Walter B. Merrill, 117 So. 473?

In answer to your question, I am of the opinion that you are not entitled to the increase in fees prescribed by the Act approved Sept. 20, 1919 (Gen'l

Acts 1919, p. 531), the same being violative of Section 104 (24) of the Constitution of 1901.

Biennial Report of Attorney General, 1918-20, pp. 460, 461, 462.
Carnley vs. Moore, 118 So. 409.

The Attorney General by the cited opinion held that the Act approved September 20, 1919, (Acts of 1919, p. 531) was unconstitutional, and said that "the classification is undoubtedly an arbitrary one, made for the purpose of enacting a local law in the guise of a general one."

The Supreme Court in the case of State ex rel Montgomery vs. Merrill, 117 So. 473, had before it the question of jurisdiction of a Circuit Court, and not the increase of fees of circuit clerks in counties having a population of not more than thirty-seven thousand nine hundred and less than thirty thousand according to the census of 1910.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 26, 1929.

Hon. W. S. Sherrill,
Deputy Solicitor,
Athens, Alabama.

Court of County Commissioners—appropriation for work of superintendent of child welfare department.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 29, 1929. You state that the court of county commissioners of Limestone County, Alabama, has ordered that the sum of \$1000 per annum be appropriated for a child welfare department for Limestone County. You further state that at the June meeting of the said court a resolution was passed creating the child welfare department for Limestone County, the court appointing one of its members on said board, and the judge of the juvenile court appointing three members of the board; these four members, together with the judge of the juvenile court, the superintendent of education and the chairman of the county board of education comprise the child welfare board of Limestone County. After the June meeting the child welfare board employed and engaged a superintendent of the child welfare department for Limestone County, effective Oct. 1, 1928. Said superintendent so employed began work Oct. 1, 1928, but received no money from the county, being paid entirely by the board of education out of school funds. The board of education was to have paid \$1,400 of her salary and the county was to have paid \$1,000 per annum, making a total salary of \$2,400 per year.

You request my opinion:

1. Has the county commissioner's court the authority to revoke the orders which authorized payment of \$1,000 per year toward the salary

of the superintendent of the child welfare department, thereby cancelling said appropriation?

2. In the event the board of education desires to continue this work, could the board of education legally pay the entire salary of \$2,400 out of school funds?

In answer to your first question, I advise you that the court of county commissioners of your county may withdraw said appropriation at any time.

In answer to your second question, I advise you that the county board of education may not legally pay the entire salary of the superintendent of the child welfare department.

It is my opinion the court of county commissioners can expend public funds of the county to help pay the salary of the superintendent of the child welfare department, and assistant or assistants. Section 150 of the Code of Alabama, 1923, contains authority for such expenditure. Said Section is in part as follows:

"The county board of child welfare shall have power: (1) To employ an executive agent to be known as the county superintendent of child welfare, who shall serve at the pleasure of the board and whose salary shall be fixed by said board by and with the consent of the county board of education and the court of county commissioners, or board of revenue of the county, one half of which shall be paid out of the public funds of the county, and one half out of the public school funds, or in such other proportion as may be agreed upon by the boards authorized to make payment by this article and the county board of child welfare * * *

(2) To employ an assistant or assistants to the county superintendent of child welfare when necessary, and to provide for the compensation of such assistant or assistants in the manner as herein provided in the case of county superintendents of child welfare."

You will observe from the above Section 150, that the courts of county commissioners can expend public funds of the county to help pay the salary of a county superintendent of child welfare, and an assistant or assistants; the remainder of such salary or salaries to be paid out of the public school funds of the county. You will also observe that the court of county commissioners and the county boards of education and of child welfare shall decide what proportion of said salary or salaries shall be paid out of the public funds of the county and what proportion shall be paid out of the public school funds of the county.

There is no authority of law for the county board of education to pay the entire salary of the superintendent of the child welfare board.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 26, 1929.

Hon. Horace C. Wilkinson,
Chairman, Alabama Athletic Commission,
Birmingham, Alabama.

Dear Sir:

Permit for boxing exhibition to unit of Alabama National Guard.

Opinion by Assistant Attorney General Rayburn.

I have your letter of March 14, 1929.

You request my opinion:

Is the Alabama Athletic Commission authorized to issue a permit for boxing exhibition or wrestling match to a company, troop or other unit of the Alabama National Guard?

In answer to your inquiry, it is my opinion that said commission is not legally authorized to issue a permit for boxing exhibition or wrestling match to a unit of the Alabama National Guard.

Subsection (b) of an Act approved July 1, 1927, (General Acts, 1927, p. 93) provides that said commission may "order a license or permit issued to any patriotic organization chartered by authority of a special Act of the Congress of the United States or local unit thereof, and none other."

Unquestionably a company, troop or other unit of the Alabama National Guard is a patriotic organization of the highest type, but said units are not "chartered by authority of a special Act of the Congress of the United States," and, for this reason, said units are not included in the Act here considered. In construing the entire Act, it is my opinion that the purpose of the Act was to permit Posts of the American Legion, and kindred patriotic organizations, to stage boxing and wrestling exhibits, and no other organizations.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 26, 1929.

Dr. E. M. Shackelford,
President, State Normal School,
Troy, Alabama.

Dear Sir:

State Board of Education—not authorized to employ attorney to pass upon deeds to property purchased by State.

Opinion by Assistant Attorney General Koonce.

I have your letter of recent date in which you state that the State Board of Education instructed you to purchase certain property adjoining the State Normal School. You further state that you employed an attorney to pass upon the deeds and other papers in connection with such transaction.

You request my opinion:

Have I authority to pay the attorney referred to above from school funds?

In my opinion, you have no authority to pay the attorney mentioned in your letter, from school funds.

Section 474, School Code of 1927, contains the provision that the State Board of Education shall have the control and management of the several normal schools or teacher's colleges of the State.

Section 853, Code of Alabama, 1923, provides that the Attorney General must give his opinion in writing or otherwise, on any question of law connected with the interest of the State or with the duties of any of the departments.

I have been unable to find any law which will give either the State Board of Education or you the authority to employ an attorney to prepare or pass upon the deeds to property which is purchased for the Normal School at Troy.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 26, 1929.

The Tax Collector,
Seale, Russell County, Alabama.

Dear Sir:

Sales Book—time for preparing same.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 19, 1929.

You request my opinion:

What is the last day the tax collector has in which to make his book of sales in conformity with Section 241 of an Act approved September 15, 1919, (General Acts 1919, p. 352)?

In answer to your inquiry, I advise you that this book should be prepared by you and delivered to the probate judge on or before the first day of March, but if for any cause there has been a failure to deliver the same by that time, it may be delivered thereafter. Section 242, of an Act approved Sept. 15, 1919 (General Acts 1919, p. 353) provides as follows:

"Section 242. Such book shall be prepared in a neat and orderly manner, in a fair and legible handwriting with sufficient space in each case to make the necessary entries, and in other particulars in a manner suitable for the purpose for which it is to be used; and if it is not thus prepared, the judge of probate shall cause it to be so prepared at the expense of the collector, and the cost thereof shall be deducted from his compensation. Such books shall be delivered to the judge of probate on

or before the first day of March, but if from any cause there has been a failure to deliver the same by that time, it may be delivered thereafter."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Hon. W. H. Quillin,
Solicitor Law and Equity Court,
Russellville, Ala.

March 26, 1929.

Justice Court—proceedings in where defendant demands jury trial.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of March 7, 1929.

You request my opinion:

Where the defendant demands a jury trial before a justice of the peace, it is the duty of the justice of the peace to bind the defendant over to the circuit court, and is it necessary that the case be investigated before the grand jury, and that the grand jury return an indictment against the defendant before the case can be tried in the circuit court?

In answer to your inquiry, it is my opinion that there must be an indictment by the grand jury before the circuit court would have jurisdiction of such a case as you discuss.

Section 3854, Code of Alabama, 1923, provides that a defendant may demand a jury trial in a proceeding before a justice of the peace, and that when a jury trial is demanded the defendant is required to enter into bond, with good sureties, conditioned for his appearance at the next session of the circuit court of the county to answer the charge concerning which he has appeared in the justice court, and in case the defendant fails to give such a bond, he must be committed to the county jail until the next session of the circuit court having jurisdiction of the facts, unless he elect in the meantime, to perform hard labor for the county as provided by law.

The giving of a bond under the Section cited above, effectually transfers the case to the circuit court.

Streanger v. State, 21 Ala. App. 600, 110 So. 595.

However, Section 3854, Code of Alabama, 1923, does not authorize the circuit court to proceed to try the case without the formality of an indictment, for the reason that, such a trial would violate "the due process" clause of the Federal Constitution.

See *Streanger v. State*, 21 Ala. App. 600, 110 So. 595;

Ex parte State, 71 Ala. 371;

Ex parte Pruitt, 13 So. 317;

Pittman v. State, 93 So. 42.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 27, 1929.

The Sheriff,
Troy, Pike County, Alabama.

Automobile Tag—Theft of constitutes petit larceny.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of March 6th. in which you advise that you have arrested a man for stealing a dealer automobile tag.

You request my opinion:

Should this man be charged with grand larceny or petit larceny?

In answer to your inquiry, I am of the opinion that this man should be charged with petit larceny. A dealer automobile tag or any other kind of automobile tag is merely the evidence of a privilege or license. A license or privilege cannot be the subject of larceny. In defining grand larceny, Section 4905, Code of Alabama, 1923, provides that "any person who steals any personal property, other than hereinbefore enumerated, of the value of \$25.00 or more, * * * with the intent to convert it to his own use, shall be guilty of grand larceny." In defining petit larceny, Section 4908, Code of Alabama, 1923, provides that, "any person who steals * * * any personal property under any other circumstances than are specified under Section 4905, if the value of the property is less than \$25.00, is guilty of petit larceny."

An automobile tag is personal property and any person who steals one is guilty of petit larceny, for the reason that the intrinsic value of the tag is less than twenty-five dollars.

Jackson & Dean vs. The State, 69 Ala. 249.

I may say also, for your information that where one loses an automobile tag and another finds it, the finder cannot legally use it on a motor vehicle, and if the finder does so use it he commits a misdemeanor, under Sec. 24, Act approved Sept. 13, 1923 (Gen'l Acts 1923, p. 292).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 27, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
State Capitol,
Montgomery, Ala.

Officers—Circuit Solicitor Jefferson County—payment of salary—
acts construed.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of January 16, 1929, is acknowledged. You make the following statement of facts:

The Circuit Solicitor of the 10th Judicial Circuit, which is composed of Jefferson County only, was elected at the November election, 1922, for the term of office of four years beginning on the first Monday after the second Tuesday in January, 1923. He duly qualified and entered upon the discharge of his duties as such Solicitor. His salary was fixed by Section 3 of an Act approved September 25, 1915, (Acts 1915, p. 819). On August 22, 1923, an Act of the Legislature was approved (Acts 1923, p. 203 et seq.) which, if valid, had the effect of increasing the salary of such Solicitor for the period of the rest of his then current term of office from \$4500 per annum to \$6000 per annum. This last mentioned Act purported to amend said Section 3 of the said 1915 Act to the effect above stated. This amendatory Act in no way purported to change the duties of such Solicitor from what they were when he entered upon his then current term of office.

On September 29, 1923, an Act was approved which also purported to amend said Section 3 of said 1915 Act, (Acts 1923, p. 751 et seq.) This Act ignored the said Act of August 22, 1923; provided that the circuit solicitor in such a county as Jefferson should receive a salary of six thousand dollars, and provided that the Act should not go into effect until the first Monday after the second Tuesday in January, 1927, which date would be the beginning of the next term of office of circuit solicitor.

By the Act of 1915, \$2400 per annum of the Solicitor's salary was to be paid out of the State Treasury and \$2100 thereof out of the County Treasury. By the amending Act of date August 22, 1923, it was provided that \$2400 of the salary should be paid by the State Treasury and the balance of \$6000 per annum, to-wit \$3600 should be paid by the county.

No change was made in said amendatory Act either of the amount of salary to be paid by the State or in the kind or amount of duties to be performed by the circuit solicitor. By said amendatory Act, his salary was attempted to be increased during his term of office by an additional payment out of the county treasury of \$1500 annually. The amendatory Act of September 29, 1923, provided for an increase of salary for the office to begin at the beginning of the next succeeding term. The Treasurer of Jefferson County, after August 22, 1923, paid the salary of the solicitor as provided for in the amendatory Act approved of that date.

You wish my opinion upon the following:

1. Whether said Act approved September 29, 1923, in amending Section 3 of the Act approved September 25, 1915, (which said Section 3, the Act approved August 22, 1923, purported to amend) did not repeal said Act approved August 22, 1923.

2. Considering Section 167 of the Constitution of Alabama, was said Solicitor entitled to receive any increase in his salary by virtue of said amendatory Act approved August 22, 1923?

3. If said solicitor was entitled to receive the increase provided by the Act approved August 22, 1923, was he entitled to such increase any longer than the approval of the Act approved September 29, 1923?

4. If I advise that such solicitor was not entitled to any increase in salary by virtue of the Act approved August 22, 1923, was the

county treasurer liable on his official bond for paying such increase in salary out of the county treasury?

In reply will say that the Act approved August 22, 1923, purporting to amend Section 3 of the 1915 Act so as to increase the salary of the solicitor of Jefferson County during his term of office, was clearly unconstitutional as being in contravention of Section 167 of the Constitution. The Legislature in enacting the amendatory Act approved September 29, 1923, clearly recognized that fact and paid no attention to it; but amended said Section 3 in a constitutional way. The said Act of September 29, 1923, did not repeal the Act of August 22 as there was nothing valid in said Act to repeal.

In answer to your second question will say, that since said Act of August 22 was void, the solicitor was clearly not entitled to receive any salary by virtue of said Act. The Act of 1915 remained unaffected by the passage and approval of said Act of August 22. The Solicitor of Jefferson County was still entitled to a salary of \$4500 per annum under the 1915 Act. All salary for the then current term of his office in excess of \$2100 per annum, paid him by the county treasurer, was illegally paid, since the State paid \$2400 per annum of the salary.

The foregoing answers also question three.

In reply to question 4 will say that Section 5647 of the Code provides as follows:

"The Governor may cause suits to be instituted for the recovery of any public moneys, or funds or property of the State of any county, lost by the neglect or default of any public officer, or which have been wrongfully expended or disbursed by such officer or which have been wrongfully used by such officer, or wrongfully received from him."

The foregoing clearly gives right of action against the county treasurer, as well as against the solicitor, for recovery of money which was wrongfully disbursed by him. Section 302 of the Code requires the county treasurer to give bond. Section 2613 of the Code provides what the conditions of the bond shall be. The conditions named do, in my opinion, cover such a disbursement. I am, therefore, of the opinion that the county treasurer and his bond is liable for the disbursement under the facts stated, to the extent of the payment out of the county treasury of such increase, to-wit: \$1500 per annum.

In my opinion, Section 2619 of the Code, if constitutional, has no application under the facts stated. This Section reads as follows:

"2619. Officer paying and person receiving money paid under void law, not liable therefor—When any state or county official shall have collected or paid out any money, as fees, salary or compensation for official services rendered under any law of Alabama, general or special, which law, subsequent to such collection or paying out, shall be declared by the Supreme Court of Alabama to be unconstitutional or void or illegal, such officer shall not be liable, either individually or

on his official bond, in any suit brought for the recovery of such money, so collected or paid out, nor shall the person to whom the same shall have been paid, be liable therefor."

The services rendered by the Solicitor of Jefferson County, were not rendered under said amendatory Act approved August 22, but under the law as it existed independent of such Act. Since valid laws required the performance of such services, it cannot be held that such services were performed under the invalid Act. Section 2619 was never intended as a buffer against the provisions of Section 167 of the Constitution. It was intended, as we construe it, to apply where an Act of the Legislature provides for the performance of a service, not otherwise required under the law, and provides fees, salary or compensation for the performance of such service, and the officer performs such service and is paid the fees, salary or compensation provided by the statute therefor.

In the case under consideration, the services performed by the solicitor were required by existing valid laws; the compensation for such services was provided for by existing valid laws. The amendatory Act in question, approved August 22, 1923, undertook to increase this compensation for the services already required of such solicitor when he entered upon his then current term of office. This was in contravention of Section 167 of the Constitution. Under such facts, Section 2619 of the Code in my opinion, has no application.

The Circuit Solicitor, although his circuit coincides with a county as to territory, is not a county officer within the meaning of the second amendment to the Constitution of Alabama with reference to salaries of county officers of Jefferson County.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 28, 1929.

Hon. G. W. Desmond,
Justice of the Peace,
Blocton, Bibb County, Alabama.

Dear Sir:

Sheriffs—Service of papers from Justice Court.

Opinion by Assistant Attorney General Haynes.

I have your letter of February 16, 1929, in which you state that you are a Justice of the Peace in your county. You also state that on certain judgments which have been obtained against defendants you issued garnishments against a defendant who had moved from your county into Shelby County; that you sent these garnishments to the Sheriff of Shelby County to be served on a certain Coal Company of that County where the defendant is working. The Coal Company refuses to be served with these garnishments.

You request my opinion:

How am I to get service?

The duties of sheriffs of the various counties are defined by Section 10189, Code of Alabama. A Sheriff does not have to accept papers from a Justice Court, but where he does accept same for service, it becomes his duty as such Sheriff to diligently handle the process.

The defendant or garnishee does not have to permit service. It is the Sheriff's duty to serve him with such process whether he wants it or not. If he refuses to take it, the Sheriff should lay it down on his desk or leave it at his last known place of business. I think this would be sufficient.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 28, 1929.

The County Superintendent of Education,
Rockford, Coosa County, Alabama.

Dear Sir:

County Board of Education—payment of teachers when absent on account of sickness.

Opinion by the Attorney General.

I have your letter of January 29, 1929. In it you request my opinion:

Is it legal to pay a teacher a full month's salary when the teacher has been absent from school a part of the time on account of sickness?

In my opinion such action is not necessarily legal, but may be legal, depending upon the idea you attempt to convey by the language used by you in your letter of request.

Your attention is invited to Section 176, Alabama School Code, 1927. The pertinent part of said Section is as follows:

"The County Board of Education shall have the authority, under such rules and regulations as may be promulgated from time to time by the State Board of Education upon the recommendation of the State Superintendent of Education * * * * to provide for the payment of any teachers, whether employed by the year or not, for absences during the time schools are in session where such absence results from sickness * * * * which prevents such teacher from discharging his duties, provided such payment shall not exceed one half of the proportionate part of the regular salary of such person for the period of absence, and provided further that pay for such absence caused by sickness shall not be allowed for a longer time than four weeks during any one year * * * *"

The Section contemplates, as necessary prerequisite to the execution of this possible authority on the part of County Boards of Education, the

adoption of definite rules and regulations, and the promulgation thereof, by the State Board of Education, upon the recommendation of the State Superintendent of Education. The duty of the State Board of Education and the State Superintendent of Education in the matter of such rules and regulations, and the promulgation thereof, is mandatory, and obviously the law contemplates that the various County Boards of Education be apprised of such rules, which of course must appear in the minutes of the State Board of Education. The provision for pay to persons sick applies only to teachers. It applies to teachers employed on a twelve month basis as well as to teachers employed for a school term or a lesser period. Under this provision of law sick pay is obtainable only for absences during the time the school of the teacher is in session, and only for such sickness as prevents such teacher from discharging his duties.

It is a matter of common knowledge that the practice prevails throughout the State of paying some teachers by the calendar month and others by the scholastic month. In any event, the law provides that where a teacher, during the school session, has been prevented from discharging his duties because of sickness, then such teacher may be paid not to exceed one-half of the proportionate part of the teacher's regular salary for the period of absence, but the allowance of pay shall not cover a longer period than four weeks during any one year. The word "year" not being otherwise limited, must be interpreted according to Section 2, Alabama School Code, 1927, and Section 9, Code of Alabama, 1923. This means that the most pay which can be allowed to a teacher for sickness which has prevented him from discharging his duties and which occurred during the school session, in any one calendar year, is one half pay for four weeks. In other words as I interpret this Section, if a teacher were absent four weeks during a calendar year, and during school sessions, because of sickness which prevented the teacher from discharging his duties, the teacher might draw **two weeks' full pay**. If absent five weeks, then full pay for two weeks, or half pay for four weeks, and no pay for the fifth week.

I might call your attention to the fact that no payments can be made except that proper contracts have been executed and except that the minutes of the County Board of Education, which should be accurate and detailed, give authority for the disbursement of the amount. The authority for each disbursement of school funds by a County Superintendent of Education should appear in the minutes of the County Board. Unless full authority for the expenditure of each item and for each contract made, appears in the minutes, then the disbursement has not been made according to law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 28, 1929.

Clerk Circuit Court,
Vernon, Lamar County, Alabama.

Circuit Clerk—fees of. Clerk entitled to fee for keeping minutes on rule day as provided for in Section 9455 of Code of Alabama, 1923.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of March 7, 1929, in which you request the opinion of the Attorney General on the following question of law:

Is the circuit clerk entitled to two dollars per day for keeping the minutes of the circuit court on rule and return day, as provided in Sections 9455 and 9456 of the Code of Alabama, 1923?

I am of the opinion that the fees of the circuit clerk for keeping the minutes of the circuit court is provided for in Section 7279 of the Code of Alabama, 1923, which is as follows:

"7279. Clerks of the circuit courts in the counties where the ex officio fees of clerks are limited to two hundred dollars or less, shall be allowed out of the county treasury of the respective counties two dollars per day for the time the circuit court is in session in the county of which he is clerk, for keeping the minutes of his said court, warrants for such service to be drawn by the probate judge of the respective counties; but said claim shall be first presented to and passed upon by the commissioner's court or board of revenue of the respective counties."

I am further of the opinion that Section 9455 of the Code of Alabama, 1923, provides that the first Monday in each month shall be rule days and the circuit court shall be deemed to be open and in session for the return of writs and process issued from or returnable to such court for the entry of defaults and judgments by default, and decrees pro confesso; and also for the purpose of receiving, entertaining and disposing of all matters, rules, orders or other interlocutory proceedings which parties may make or apply for.

The above Section declares that the court is in session on rule day, therefore if there are matters presented that should be noted in the minutes of the court, the clerk would be entitled to a fee of two dollars per day for keeping the minutes of said court, provided the clerk comes within the provisions of Section 7279 of the Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 29, 1929.

Alabama State Board of Health,
Montgomery, Alabama.

Attention: Dr. Douglas L. Cannon, Acting Health Officer.

Dear Sirs:

Municipal contract for the operation of abattoir where president of council interested in said enterprise.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 1, 1929. You state that in December 1922 the City of Dothan entered into a contract with the Dothan Packing Company, granting to said company an exclusive right to operate an abattoir in the City of Dothan. You have enclosed a copy of said contract.

You state that it has become quite the general practice among farmers in the Dothan community to bring fresh meats into the city, and that these are not inspected. The present city council is rather reluctant to force the farmers to submit their animals to the slaughter house for slaughter and inspection, because they feel that a monopoly has been created by the ordinance referred to above, copy of which you have enclosed. The city council of the City of Dothan desires to adopt the standard meat inspection ordinance, together with the state board of health regulations covering the production, handling and sale of milk. Said city council desire to pass the standard meat inspection and abattoir ordinance submitted by the state health department, provided that such action will nullify the contract entered into by a previous administration.

You request my opinion:

Is the contract entered into by the City of Dothan with the Dothan Packing Company, which was approved January 6, 1922, and which gave the Dothan Packing Company the exclusive right to conduct an abattoir within the corporate limits of said City, for a period of twenty years, when the president of the city council was a principal stockholder in the Dothan Packing Company at the time said contract was entered into valid?

In answer to your inquiry, I advise you that the ordinance which created a monopoly in favor of the Dothan Packing Company is null and void.

Section 2381, Code of Alabama, 1923, provides that no officer or employee elected or appointed in any city within the State of Alabama, shall be interested, directly or indirectly, in any contract for work or material, or the profits thereof or services to be furnished or performed for the city.

I therefore advise you that the city council of the City of Dothan may terminate such contract at any time and adopt an ordinance on the subject of your inquiry.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Mr. J. W. Miller,
Justice of the Peace,
Ozark, Alabama.

March 29, 1929.

Justice of the Peace—commission of.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of recent date. You state that you have been elected to succeed yourself as justice of the peace.

You request my opinion:

Is it necessary that you qualify again for such office, or will your previous commission hold good for the present term?

In answer to your inquiry, I advise you that it is necessary for you to secure another commission, and make another bond.

Section 2579, Code of Alabama, 1923, enumerates state and county officers who are commissioned officers, and names a justice of the peace in said category. Section 2580, Code of Alabama, 1923, states the method and manner of the issuance of a commission to said officers. Section 2581, provides that no commissioned officer of this State required by law to give bond shall receive his commission until he has made his bond, and had the same properly approved and filed. In view of the foregoing statutes, it is my opinion that you have not qualified for your new term until you have complied with the conditions of the above cited statutes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 29, 1929.

Director of Child Welfare Department,
The Capitol.

Dear Madam:

County Commissioners—Budget defined. Validity of county warrants—must be drawn by probate judge, pursuant to an order of county commissioner allowing same.

Opinion by Assistant Attorney General Smith.

I have your letter of March 18, 1929, in which you state as follows:

"A county appropriates \$1,500.00 to a child welfare unit of the county for the fiscal year 1929, running from December 31, 1928, to December 31, 1929, payable in monthly installments of \$125.00. This appropriation is made a part of the financial budget for the county for the fiscal year 1929."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Is it necessary for the commissioners court to pass upon each monthly installment before the judge of probate of the county is authorized to issue the warrant for the monthly installments when the amount has been fixed in the year's budget?

I am of the opinion that the appropriation of \$1,500.00 in monthly installments mentioned in the budget for the ensuing year by the commissioners court is not within itself a sufficient appropriation that would justify the paying out of county funds. A budget is simply an annual financial statement of the county. It comprehends a general view of the finances of the county with the proposed financial measures for the ensuing year. It is simply an estimate of the year's expenses. Therefore, to legally pay these amounts of the monthly installments, it would be necessary to have each monthly installment authorized by the court of county commissioners and warrant issued by the judge of probate as other appropriations are made and paid.

It is essential to the validity of the warrant that it should have been drawn by the judge of probate, in pursuance of an order of the county commissioners allowing the amount. These things must concur. Without the authority of the court of county commissioners, the judge of probate cannot draw a warrant on the county treasury.

Speed v. Cook, 57 Ala. 209.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 30, 1929.

The Probate Judge,
Abbeville, Henry County, Ala.

Dear Sir:

County Depository:

1. Another may be designated when bank fails or goes out of business.
2. Commissioners' Court or Board of Revenue authorized to borrow money in anticipation of taxes.
3. All county funds should be deposited with the county treasurer for distribution.

Opinion by Assistant Attorney General Haynes.

I have your letter of March 28, 1929, in which you state the following:

(1) When a bank, which is the County Depository, has closed to business and thereby ceased to function as such depository, whether temporarily or permanently, is the County Commissioners Court or Board of Revenue, as the case may be for the county, authorized to arrange for a treasury department, by whatever style name such treas-

ury department may be, to function as such treasury or depository for the county during the time such County Depository fails to serve the county as such.

(2) In the event such Court or Board being so authorized and all county funds being unavailable for reason of such suspension of banking business, is such Court or Board authorized to negotiate temporary loan or loans in anticipation of collection of taxes for the purpose of defraying current county governmental expenses and ordering disbursement of such loan or loans through such treasury department for payment of such expenses.

(3) Is such Court or Board authorized to direct that all revenue due the county be paid to such temporary treasury department for disbursement.

You request my opinion:

1. On the failure of the bank, which was the county depository, is the county authorized to reappoint or designate another?

2. Can the Commissioners' Court or Board of Revenue borrow money in anticipation of taxes to meet the current expenses of the county?

3. Should such Commissioners' Court or Board of Revenue designate that all revenues due the county be paid to such depository or treasurer?

In answering your first inquiry, it is my opinion that your Board of Revenue or Court of County Commissioners, under the conditions set out in your request, may designate another depository for your county funds, and if it is not able to find a bank that will accept the appointment as such depository, then under Section 322, Code of Alabama, 1923, it may designate someone as county treasurer under such terms and conditions as it may fix. It is true when you appoint or designate any bank a county depository this appointment is made with the idea that it is to continue for a year, but where the bank which is so designated fails or goes out of business for any reason, certainly the county would in that event have a right, and it would be its duty to designate another, or appoint someone to act as treasurer under Section 322, *supra*.

Answering your second inquiry it is my opinion that under Section 6776, Code of Alabama, 1923, your county through its Commissioners' Court or Board of Revenue may borrow money to meet the current expenses of the county. This Section is as follows:

"6776. Counties may make temporary loans in anticipation of taxes. —Courts of County Commissioners, Boards of Revenue, or other governing bodies of the counties of this State, for and in behalf of their respective counties, may borrow money in anticipation of the collection of taxes for the year in which such loans are made, and issue certificates or warrants covering such loans."

However, you are limited by Section 6777, Code of Alabama, 1923, in

the amount you may borrow "to one half of the income from taxation of said county for the preceding year." This Section is as follows:

"6777. What amount may be borrowed.—Any amount borrowed under authority of the preceding section shall not be for a sum greater than one half of the income from taxation of said county for the preceding year."

You are also limited in the matter of interest which shall not exceed eight per cent per annum, and the money so borrowed shall be payable on or before the 15th day of December of the current year. Section 6779, Code of Alabama, 1923, is as follows:

"6779. Rate of interest.—Warrants issued under the provisions hereof shall bear interest at a rate not exceeding eight per cent per annum, and said warrants shall be issued for an amount not less than their face value, and shall be payable on or before December 15th of the current year."

Section 6776, Code of Alabama, 1923, designates how the warrants which are issued as evidence of this indebtedness shall be issued.

See Report of Attorney General, Office Edition, Book 7, p. 61.

In answering your third inquiry, I am of the opinion that all funds of the county should be placed in the hands of the depository or treasurer of the county, and disbursed by him on warrants drawn by the Court of County Commissioners or Board of Revenue. Of course, he or it should be required to make bond as required by law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 30, 1929.

Mr. R. C. Phelps,
Tax Collector,
Montgomery, Ala.

Dear Sir:

All property, both real and personal, of a delinquent tax payer is subject to sale for payment of taxes duly assessed to him.

Personal property belonging to delinquent tax payers must first be levied upon and sold for taxes assessed against him before real estate can be subjected to sale for payment of taxes, although the assessment be on real estate.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of March 25, 1929, is acknowledged. You state the following as facts:

J. D. and J. C. Maske bought from the Vizard Investment Company a certain tract of land in Montgomery County, Alabama. They returned it for assessment for the tax assessment year ending September 30, 1928, and was duly assessed to them. This assessment became due and payable Oct. 1, 1928, and delinquent Jan. 1, 1929. After said assessment was made, or at least, after said land was so returned for assessment, the land was returned to the seller, Vizard Investment Company. J. D. and J. C. Maske have personal property in Montgomery County which they did not assess, such as cattle.

You wish to know if, under the law, you as tax collector, can levy on such cattle and sell same for the tax due on said assessment on land.

In reply will say that you can levy upon any personal property such delinquents may have and sell the same for the payment of the tax assessed to them on said land. Section 207 of Revenue Act, 1919, (Acts 1919, p. 345) provides as follows:

"No property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes and the fees and charges lawfully incurred in assessing and collecting taxes against the owner thereof."

From the foregoing you will see that all property of a delinquent tax payer is subject to sale for the payment of taxes assessed against him, although the property levied upon be exempt from assessment.

Section 205 of said Revenue Act (Acts 1919, p. 344) requires that the personal property owned by the tax payer be first levied upon.

Lands cannot be sold if personal property sufficient to pay the taxes, costs and fees, belonging to the tax payer, can be found. Section 212, Revenue Act, 1919 (Acts 1919, p. 346).

If such cattle were assessable and not returned for taxation they may be assessed as escapes under Section 244 of the Revenue Act, 1919, (Acts 1919, p. 349). The fact that such cattle were not assessed by the tax assessor is no reason why they may not be sold for taxes duly assessed against such tax payer; and must be levied upon and sold before lands assessed by him can be sold. They may be sold for both the taxes duly assessed by the tax assessor and the tax assessed as escape by the tax collector. If you can levy upon his hat, you can sell that, as there is no class of personal property exempt from sale for payment of delinquent taxes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 30, 1929.

The Circuit Clerk,
Geneva, Geneva County, Alabama.

Dear Sir:

County convicts turned over to State—cost bills. Fine and forfeiture fund.

Opinion by Assistant Attorney General Rayburn.

I have your letter of February 8, 1929.

You request my opinion:

(1) Should I make out cost bills in cases where Geneva County has turned over its county convicts to the State and file said cost bills with the probate judge and commissioners?

(2) Where judgment has been rendered against the defendant and executions against him have been returned marked "no property found" is the cost in such a case a proper charge against the fine and forfeiture fund?

In answer to your first question I advise you that you, as circuit clerk, are not required to present the bill of cost in such a case as you name to the probate judge and commissioners.

In answer to your second question, I advise you that the cost is a proper charge against the fine and forfeiture fund, provided that Section 4039, Code of Alabama, 1923, is fully complied with.

Section 3702, Code of Alabama, 1923, provides that the State Board of Administration pays to the county certain costs, thereby dispensing with the necessity of the circuit clerk of the county making out cost bills for presentation to the court of commissioners in cases where county convicts have been turned over to the State. However, such a bill of cost should be presented to the Convict Department, which Department will pay only the items of cost allowed under Section 3667, Code of Alabama, 1923.

Section 4039, Code of Alabama, 1923, provides among other things that where there is a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered claims of State witnesses, the county treasurer of such county must pay the officers of the court, their cost, arising from criminal cases in which the defendant is convicted and where return execution shows "no property found."

It should be remembered that county convicts turned over to the State in some instances are sentenced additional time for court cost, while State convicts are never so sentenced.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 30, 1929.

Hon. Raymond C. Smith,
County Solicitor,
Clanton, Chilton County, Ala.

License tax—Barber shop license not transferable. Operator pays license fee \$2.50 for each chair.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of March 19, 1929, in which you state that a license was duly issued to the Exchange Barber Shop, which was operating four chairs, and that subsequently the title to said shop was transferred, but that the said shop is still operating under the same name and with the same number of chairs, the only change being that two of the barbers have been replaced by two barbers from another licensed shop.

You request my opinion:

Are the new owners liable for a license, and how much should they pay, and does this license attach to the person or is it a license or tax on the chair?

In reply to your inquiry, I am of the opinion that the license issued to the former owners of the Exchange Barber Shop is not transferable, and that a new license is required under Section 305 of the Revenue Code of 1923. Said Section, among other things, expressly provides "and such license shall not be transferable." Further answering your inquiry your attention is directed to Section 303, Schedule 13 of the Revenue Code of 1923, which reads as follows:

"Schedule 13 BARBER SHOPS.—Each person engaged in the business of operating a barber shop shall pay a license fee of two and one-half dollars for each chair."

Under this Section the present owner is required to pay a license fee of two and one-half dollars for each chair or the sum of ten dollars. In the event the present owner of the barber shop fails to procure a license, he is liable to prosecution under the terms of Section 309 of the Revenue Code of 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 1, 1929.

Hon. John C. Haislip,
Mayor, Gurley, Alabama.

Mayor—jurisdiction of.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of March 23, 1929. You state that the Town of Gurley is located in Madison County, Alabama, but that the corporate limits of said town run up to within one-fourth of a mile of the Jackson County line. You refer to Sections 1954 and 4895, Code of Alabama, 1923.

You request my opinion:

Have I, as Mayor of Gurley, jurisdiction to try cases for violation of the town ordinances of the said town regulating and punishing the selling or giving away of prohibited liquors, where the act is committed within Jackson County, Alabama, but within the police jurisdiction of said town of Gurley?

If you say that I have jurisdiction to try such cases, would my jurisdiction extend only to one-fourth of a mile beyond the county line or would it extend to a point one and one-half miles beyond the corporate limits?

In answer to your inquiry, I advise you that you, as Mayor of Gurley, have jurisdiction to try cases in which the law confers jurisdiction on you, growing out of the acts or omissions committed within the police jurisdiction of said Town.

Section 1954, Code of Alabama, 1925, fixes the police jurisdiction of a town the size of Gurley at $1\frac{1}{2}$ miles beyond the corporate limits of said town. The fact that said police jurisdiction extends into another county, does not lessen the jurisdiction which is conferred by said statute named above.

Section 4895, Code of Alabama, 1923, does not apply in such a case as you name. Such a Section only applies in matters arising in the circuit court or in county court. This Section has no application to municipalities.

Yours truly,

CHARLIE C. McCALL,

Attorney General.

April 2, 1929.

The Deputy License Inspector,
Greenville, Butler County, Alabama.

License Tax—Person operating cold storage business with refrigeration capacity of less than 50,000 cu. ft. not liable for license.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of November 28, 1928. You state that the Greenville Ice Co., manufactures and sells ice, and operates in connection with said business a storage and refrigeration room of less than 50,000 cu. ft. capacity. You state further that this room is used for storage and refrigeration of perishable goods for which they receive pay or remuneration.

You call my attention to Schedule 30 under Section 303 of the Revenue Code of Alabama, 1923, and request my opinion as to whether or not you should proceed to collect license under the fourth clause of this schedule.

In reply to your inquiry I am of the opinion that you cannot collect license for this storage and refrigerating room under said schedule for the reason that no license is provided for a cold storage business which is less than 50,000 cu. ft. refrigerating capacity. The fourth clause of said schedule provides for a license of seventy-five dollars for operating a **refrigerating pipe line** for the purpose of refrigerating the rooms, premises, goods, wares or merchandise of others for profit. I, therefore, do not believe that you can charge the Greenville Ice Co., cold storage license under this schedule.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

✓
April 2, 1929.

Hon. Ernest L. Hargrave,
Deputy Solicitor,
Juvenile and Domestic Relations Court,
Birmingham, Alabama.

(1) School attendance: Child whose parents live in Morgan authorized to attend school in Jefferson County.

(2) County Board of Education not authorized to charge certain fees.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of January 10, 1929. You state that a child who lived with its parents in Morgan County until recently is now living with its grandparents at Tarrant City in Jefferson County for the purpose of being sent to the public schools of Jefferson County. You also state that the child

offered himself as a pupil in the Jefferson County schools but that the County Superintendent refused to accept him on the ground that he was a non-resident of Jefferson County.

You request my opinion:

1. Is the child legally entitled to attend school in Jefferson County?
2. In the event the child is permitted to attend the Jefferson County schools, can the County Board of Education assess and collect a fee for said attendance, other than the incidental fees collected from all pupils who attend such school?

Answering your first question, it is my opinion that the child when he began to live with his grandparents in Tarrant City became a resident for school purposes of Tarrant City and Jefferson County, and is entitled to attend school either in the City Schools of Tarrant City or in the Jefferson County Schools.

In answer to your second question, it is my opinion that the County Board of Education could not assess and collect a fee other than the incidental fees assessed and collected from all pupils in the regular way provided by law, and by the authorities designated in the School Code.

Under Section 305 of the Alabama School Code, 1927, the grandparents became persons in loco parentis and would be guilty of a misdemeanor if they failed to send the child to school or have him instructed by a private tutor.

Section 203 of the Alabama School Code 1927 provides in part as follows:

"Attendance of City Schools by Children without The City.—City and County Boards of Education shall have authority to reach agreements whereby children in the City may attend the schools in the County, and whereby the children in the County may attend the schools in the City, and they shall do so when the school in the City or in the County, as the case may be, is nearer to such pupils. In the event the said Boards do not reach agreements for such attendance, the matter shall be referred by either Board to the State Superintendent of Education who shall, after investigation, issue an order relative to same which shall be binding on both Boards."

Under this section, the child being a resident of Tarrant City, the City and County Boards of Education are authorized and it becomes their duty to reach an agreement whereby the child may attend school either in the City or in the County, and in the event said boards do not agree, the matter is referred to the State Superintendent of Education and his order is binding on both boards.

Under the School Code all children between the ages of seven and sixteen years are required to attend school or be instructed by a private tutor.

Alabama School Code 1927, Sections 301, 303.

I find no law contained in the School Code or elsewhere which requires a child to attend school only in the city or county where his parents reside. If the parents of the child in Morgan County see fit to send their child to reside with its grandparents in Jefferson County, they have the right to do so and such child should be allowed to attend school in the city or county where the grandparents reside.

There is no authority of law giving County Boards of Education the right to assess and collect from non-residents any fees in addition to those assessed and collected from all pupils attending county schools, although there is some authority for City Boards of Education to do so. Section 203, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 3, 1929.

Alabama Highway Director,
Montgomery, Alabama.

Highways—Persons encroaching on rights-of-way may be prosecuted under Section 191 of Highway Act 1927.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of March 12, 1929, in which you state as follows:

"I have been called on by the Bureau of Public Roads to advise them under what provision of law this Department could protect its rights of way for roads and bridges from encroachment of filling stations, lunch rooms, etc., after having been secured from the various counties for road construction by the State of Alabama."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Under what law can the State Highway Director prohibit persons from erecting and maintaining filling stations, lunch rooms, etc., on highway rights-of-way procured by the various counties for the use and benefit of the State of Alabama for highway purposes?

In answer to your question, I call your attention to Section 191 of the Highway Act 1927, (Acts of Legislature 1927, p. 400) which in my opinion answers your question.

"Section 191. CHANGING, OBSTRUCTING, INJURING PUBLIC ROADS.—To change a public road, except by order of the court of county commissioners, founded on a report of viewers appointed by the court, unless it straightens the same through inclosures, or renders it

more convenient for the public; to obstruct a public road by a fence, bar, or other impediment, except by gates erected across the same by leave of the court of county commissioners, obtained as provided by law; to cut or place a tree, brush or other obstacle across or along a public road so as to impede travel, and not remove the same within six hours; wilfully to deface, injure, or destroy any mile post, index board, bridge, or causeway; or wilfully to injure or obstruct any public road in any way, is a misdemeanor."

I am of the opinion that you can prosecute persons violating this Section where the evidence is sufficient, and after giving the notice required in said Section.

See also Section 19 of Highway Act, 1927, page 354.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 3, 1929.

Mr. I. T. Hooks,
Justice of the Peace,
Linwood, Alabama.

Road duty—paroled convict not exempt therefrom.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of March 21, 1929.

You request my opinion:

Is a man who has been out on parole five or six years exempt from road duty in the State of Alabama?

In answer to your inquiry I advise that such a person is not exempt from road duty under the laws of the State of Alabama, unless he comes within the class enumerated in Sections 163 and 164, of an Act approved August 23, 1927, (Acts 1927, p.p. 393 and 394) which statutes provide for the working of public roads by certain persons and exempts certain other persons therefrom.

There are, of course, certain other exemptions applicable to inhabitants of certain classes of counties and for inhabitants of municipalities, but discussion of this is not pertinent to your inquiry.

Opinions of Attorney General, Vol. 9, p. 228, Office Edition.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 3, 1929.

The Sheriff,
Tuscumbia, Colbert County, Ala.

Contraband property connected with still, forfeited to the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 19, 1929, in which you state that in December, 1928, you raided a still, captured two men, 220 gallons of whiskey and a Dodge Touring car. While watching the still four men came to it in this car. After capturing two of the men, you found that the car contained two bags of sugar and three bags of barley malt. You state that you still have the car in your possession.

You request my opinion:

What disposition under the law can I make of this car?

It is my opinion, if this car was being used to convey sugar or barley to a still to be manufactured into whiskey, and was found at the still, then it becomes contraband, and must be dealt with as is provided in Sections 4771 and 4775, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 4, 1929.

Judge of Probate,
Andalusia, Covington County, Ala.

Dear Sir:

Corporations—increase of capital stock.

Opinion by Assistant Attorney General Brassell.

I have your letter of February 27, 1929, in which you state that the Horse Shoe Lumber Company, a corporation, filed for record a resolution authorizing the issuing of \$600,000.00 of cumulative preferred stock. You further state that the issuing of the preferred stock was in addition to the capital stock.

You request my opinion:

Should the fees provided for in Section 6972 of the Code of Alabama 1923, be charged in issuing preferred stock in compliance with Section 7006 of the Code?

In answer to your question, I am of the opinion that the Horse Shoe

Lumber Company, a corporation, will have to pay the fees prescribed by Sections 6969 and 6972 of the Code of Alabama, 1923.

Opinion of Attorney General, Book 4 (Office Edition) p. 52, Biennial Report of Attorney General, 1918-20, p. 242.

The resolution authorizing the issuing of \$600,000.00 of cumulative preferred stock is an increase of capital stock, and therefore, the fees prescribed by Sections 6969 and 6972 of the Code of Alabama, 1923, should be collected. Under Section 6972, before the Articles increasing the capital stock of any corporation is filed in the Office of the Judge of Probate, a charter fee of one dollar for each one thousand dollars of the proposed increase in capital stock must be paid to the Judge of Probate for the use of the State. Sections 6969 and 6972 are to be construed in *pari matri*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 4, 1929.

Alabama State Board of Health,
Montgomery, Alabama.

Attention Dr. Douglas L. Cannon,
Acting State Health Officer.

Dear Sir:

Death certificate—who required to make.

Opinion by Assistant Attorney General Rayburn.

I have your letter of March 23, 1929. You state that the superintendent of the Hillman Hospital in Birmingham has secured authorization from the physicians of the staff of said hospital for clerks in the hospital office to fill out and sign, in the attending physician's name, death certificates of patients dying in the institution.

You further state that the advice requested is necessary to the present performance of an official act of your board.

You request my opinion:

Can a physician legally delegate the duty of signing a death certificate, which is imposed on him by Section 1071, Code of Alabama, 1923, to any other individual, or must he fill out and sign the certificate personally?

In answer to your inquiry, I advise you that Section 1071, Code of Alabama, 1923, makes it mandatory that the attending physician shall make and sign death certificates. Clearly, he cannot do this by proxy, or give authorization to any other person. Such Section is susceptible of only one construction and that is, that the attending physician is supposed to know the *causa*

mortis, and is, therefore, personally charged with the responsibility and duty of making and signing said death certificates.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 4, 1929.

The Superintendent of Education,
Linden, Marengo County, Alabama.

Dear Sir:

School Districts—Elections to enlarge—levy of district tax.

Opinion by Assistant Attorney General Koonce.

I am in receipt of a letter from Mr. J. W. Watt, Superintendent of the City Schools of Demopolis, in which he states that the Demopolis School Board and County School Board desire to consolidate adjacent territory which lies outside of the City of Demopolis with the Demopolis School, in order to give the Demopolis School the advantage of the three mill school tax.

He requests my opinion:

1. What persons are entitled to vote in the election for consolidation?
2. After the consolidation has been effected, what persons have the right to vote on the levy of the three mill tax?

In my opinion, all legally qualified voters residing in either the adjacent territory proposed for consolidation outside of the City of Demopolis, and all legally qualified voters residing in the City of Demopolis, have the right to vote in the election for consolidation.

In my opinion, all persons who are legally qualified voters in the adjacent territory proposed for consolidation outside of the City of Demopolis and all persons who are legally qualified voters in the City of Demopolis will have the right to vote for the levy of the three mill school tax.

Section 276, School Code of 1927, provides for the consolidation of a city school district and territory adjacent to such city school district.

Section 277, School Code 1927, provides the effect of consolidation. The last sentence of said Section contains the provision that in the event a majority of the qualified voters in any district or adjacent territory proposed to be consolidated shall vote against the proposed consolidation, then said consolidation shall not be made. This means that separate elections must be held in the district and adjacent territory proposed to be consolidated.

I rendered an opinion on March 17, 1927, to the Judge of Probate of Marshall County (Opinions of Attorney General 1926-27, Vol. 1, p. 386) in which I held that whenever it is proposed to consolidate a district which is levying a tax with one which is not levying a tax, that separate elections must be held in each. I have rendered the following opinions to like effect:

July 7, 1927, to the Superintendent of Education of Dale County (Opinions Attorney General, 1927, Vol. 2, p. 248).

June 5, 1928, to the Superintendent of Education of Morgan County (Op. Atty. Gen. 1927, Vol. 6, p. 11).

July 25, 1928, to the Judge of Probate of Lawrence County (Op. Atty. Gen. 1928, Vol. 6, p. 334).

March 26, 1929, to the Superintendent of Education of Fayette County (See Op. of 1929, Office Edition).

I am not authorized by law to render an official opinion to Mr. Watts. For that reason I am rendering this opinion to you and mailing copy to him.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 4, 1929.

Judge of Probate,
Scottsboro, Jackson County, Ala.

Court of County Commissioners—not authorized to settle claims for death of person killed by county truck.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of February 14, 1929, in which you state, among other things, that one Andrew Holder was killed by a county truck and that upon claim being filed by his administratrix, the same was disallowed by the court of county commissioners on November 3, 1928; that on January 14, 1929, the said court reopened the case and made an order allowing the administratrix \$110.00 for hospital and funeral expenses and the further sum of \$25.00 per month for eight months, making a general total of \$310.00; that this claim was allowed without your vote.

You request my opinion upon the following question of law:

Could I be held liable for this \$310.00 in the event I issue warrant for this amount and it should be held illegal?

The claim referred to evidently grew out of an accident in which Andrew Holder was killed by a county truck. The gravamen of the cause of action is the negligence of a county employee while acting in the line and scope of his authority. This would be a tort action and not one growing out of a contract or an implied contract.

It is true that under Subsection 4 of Section 6755, Code of Alabama, 1923, the court of county commissioners has the authority to examine, settle and allow all accounts and claims chargeable against the county. This section of the Code clearly refers to claims growing out of a contract or an implied contract or, in other words, a claim that, if suit were brought against the county, the court could say is a legal claim under the statutes.

The general rule of law that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment, by which another is injured, is not applied to counties except where there is a statute imposing liability for the tortious acts of its officers, agents, servants and employees.

15 Corpus Juris, p. 570.

Counties are not liable for the neglect of their officers to perform a corporate duty unless such a right is given by statute. There is nothing in our general statutes which subjects the county to such a liability, and the general law must prevail.

Hamilton v. Jefferson County, 96 So. 628;

Jones v. Jefferson County, 206 Ala. 13;

Heigel v. Wichita County, 84 Texas 392;

Dowling v. Mason County, 87 Kentucky 208.

In accordance with the above cited authorities, I am of the opinion that the claim you mention is not a legal claim against the county and should not be paid, and you, as Probate Judge, should not draw a warrant for the payment of this claim.

The majority of the members of the court of county commissioners having passed the claim favorably, you should decline to draw the warrant. In the event the administrator is not satisfied, a writ of mandamus would lie again you to compel payment. This would raise the issue of law which the courts can settle.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 4, 1929.

The Director,
State Highway Commission,
CAPITOL.

Dear Sir:

Highway Commission: Members and employees not subject to penalties provided in Section 5611 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Smith.

I have your letter of April 4, 1929, in which you request the opinion of the Attorney General on the following question of law:

Are individual members of the State Highway Commission or its employees liable to criminal prosecution for impounding water in the construction of the public highways of Alabama as provided for in Section 5611 of the Code of Alabama, 1923?

Section 5611 is as follows:

"5611. DRAINING AND IMPOUNDING WATER IN THE CONSTRUCTION OF RAILROADS, OR PUBLIC HIGHWAYS, OR CONSTRUCTION WORK.—Any person, firm, or corporation engaged in the construction of any railroad, public highways, or other construction work in Alabama, shall drain all borrow pits, cuts and fills likely to impound water which shall be dangerous to the public health, and any person, firm or corporation failing to perform the duty imposed in this section, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty dollars, nor more than five hundred dollars."

The Alabama Highway Commission was established by the Legislature and is an arm or agency of the State Government, its officers and employees are public officials in the discharge of public duties which involve the exercise of the sovereignty of the State.

The power of the State to create this commission as its agent to carry on highway construction for its benefit or for the public interest cannot be doubted.

White v. State, 138 Ala. 419,
Comer v. Bankhead, 70 Ala. 496.

This commission and its agents are mere State agencies for the purpose of building and maintaining public highways for the State, for the use and benefit of the people of Alabama. Therefore, in my opinion they are not subject to the penalties provided for in Section 5611 of the Code, *supra*. The statute does not include the State or its duly authorized agents in performing their public duties.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 4, 1929.

The Judge of Probate,
Centreville, Bibb County, Alabama.

Dear Sir:

County Commissioners—willful neglect of duty. Mandamus or impeachment.

Opinion by Assistant Attorney General Smith.

I have your letter of March 12, 1929, in which you state that three of the County Commissioners of Bibb County refused to pass or allow any claim, or to sign the minutes of the Commissioners' Court for the reason that they disagree with you on the construction of a certain section of law, and that matters before the Commissioners' Court of your County are, therefore, blocked.

You request my opinion:

What remedy have I as to this matter?

Under Section 6748 of the Code of Alabama, 1923, you are a member of said Court of County Commissioners as principal judge. Under Section 6763 of the Code, supra, it is your duty to record the proceedings of the Court, make all necessary orders, and issue all process necessary to sustain its jurisdiction or maintain its authority. Under Section 6764 of said Code, you only have a vote in case of a divided Court. The above duties seem to be the only duties imposed on you as a member of the Court of County Commissioners by law, and I do not know of anything you can do under your statement of facts.

I am, however, of the opinion that if any member of the Commissioners' Court willfully neglects his duty, or by his acts or omissions becomes incompetent to discharge his duties, the grand jury of your county would be at liberty to investigate the situation and recommend impeachment as provided in Section 4497 of the Code of Alabama, should they so desire.

State ex rel Brickell, Attorney General vs. Martin, 180 Ala. 454.

I am further of the opinion that any person aggrieved by the failure of the Court of Commissioners to act on claims would be at liberty to compel action by writ of mandamus.

It might not be amiss to invite your attention and the attention of the members of the Commissioners' Court to Sections 868 and 869, Code of Alabama, 1923, concerning opinions of the Attorney General. Perhaps, if your disagreements are over an interpretation of the law, this office may assist you both by clarifying the matter, if you all are willing to abide by the opinions.

Yours truly,
CHARLIE C. McCALL,
Attorney General

April 4, 1929.

The Judge of Probate,
Hayneville, Lowndes County, Alabama.

Dear Sir:

Deed Tax: Only deed tax on one deed required to be paid in partition cases.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of December 13, 1928, in which you request my opinion:

Does Section 21½ of the Revenue Code of 1927 exempt from taxation deeds made under direction of the Equity Court effecting partition of lands, and does said Section exempt from taxation deeds among joint owners effecting a voluntary partition?

That part of Section 21½ of the Revenue Code of 1927, pertinent to your inquiry, reads as follows:

"and provided, further, that where several deeds or instruments are executed by tenants in common for the same consideration, only one of such instruments shall be taxable under this Section."

Construing that particular part of said Section above quoted, I am of opinion that in all partition cases where the partition is effected by suit in chancery, the deed tax is only required to be paid on one deed, where the consideration was the same in several deeds, and this same ruling applies in all cases where the partition of lands was effected voluntarily by the joint owners or tenants in common.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 5, 1929.

Judge of Probate,
Dothan, Houston County, Alabama.

Dear Sir:

Act No. 13, approved September 28, 1920 (Acts 1920, p. 10) when properly construed, is constitutional.

Warrants issued in accordance with the provisions of said Act are entitled to the security provided by said Act.

Opinion by Assistant Attorney General Evans.

Receipt of your letter of March 7, 1929, is acknowledged.

You wish my opinion upon the following:

1. Whether or not Act No. 13, approved September 28, 1920, (Acts 1920, p. 10) is in contravention of Section 215 of the Constitution of the State of Alabama?
2. Whether or not said Act conflicts with Section 231 of the Code of Alabama?

In reply will say that I find no necessary conflict between said Act No. 13 and Section 215 of the Constitution of the State. Where a statute, if applied to a certain class of cases, would result in a violation of the Constitution, but such result will not follow if the application is to another class, the statute will be held to apply to the latter class only, if this is in harmony with the general legislative intent.

State ex rel City of Mobile v. Board of R. R. Com. Mobile Co., 180 Ala. 489.

From the foregoing it follows that, so far as *ad valorem* taxes are concerned, the statute must be construed as applying to the one-half of one per

cent allowed for general purposes, since the other *ad valorem* taxes permitted by said Section 215 can be levied for and applied to the purposes only named in said section.

Said Act No. 13 was approved September 28th, 1920. The Code of 1923 went into effect August 17, 1924. It, therefore, follows that said Act No. 13, not being carried into the Code, was repealed at the time the Code went into effect. But, all warrants issued in accordance with said Act No. 13, between the date of its approval and the date of its repeal, have incorporated in them, as part of the contract for the loan or forbearance, all the provisions of said Act No. 13 giving security to the loan. No law passed thereafter, or omission of such Act from the Code, could affect such contractual rights.

Section 22, Constitution of State of Alabama.

It, therefore, follows that if warrants issued in accordance with the provisions of said Act No. 13, when correctly construed, between the date of its approval and date of its repeal, then, with reference to such warrants the provisions of said Act No. 13 must be complied with, although in conflict with Section 231 of the Code. In other words, your budget must be made to take care of such warrants to the extent and in the manner provided by said Act No. 13.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 10, 1929.

Superintendent of Insurance,
CAPITOL.

Dear Sir:

Insurance—Requiring life insurance policy to be taken out to protect mortgage loan not offensive to Section 4605 of the Code of Alabama, 1923.

Opinion by Special Assistant Attorney General Smith.

I have your letter of January 30, 1929, in which you enclose a letter from the President of the Commonwealth Life Insurance Company of Louisville, Ky., setting out their plan or method of conducting their loan business. The pertinent part of the letter is as follows:

"As I have heretofore explained to you, our company **does not solicit life insurance applications and agree to make mortgage loans as an inducement to the party to take out this insurance.** On the other hand the party desiring to secure a loan solicits our representative to submit his application and when this is done we have the property appraised by a special man from the Home Office, and if the appraisal is satisfactory we then notify the applicant as to the terms upon which we will make the loan, and while we do require the applicant to apply for an equal

amount of life insurance, this is very often done by banks in your State when they make loans.

"We charge six per cent on all loans in Alabama and other States as most of the funds which we lend are trust funds, belonging to our various policyholders, and we have, therefore, placed the safety of the investment above the idea of securing a larger rate of interest, because it is practically always true that the larger the rate the less security there is back of the loan. The borrower has always paid the fee charged by the local attorney for the examination of the title to the property, and he has also paid the fee charged by our General Counsel for drawing the mortgage and the mortgage notes, and passing upon the abstract submitted by the local attorney. We have never charged, however, either in your State or elsewhere, any so-called bonus or commission, unless you choose to consider the local attorney's fee and the General Counsel's fee as a commission."

Upon the facts stated in this letter you request the opinion of the Attorney General on the following question of law:

Does the plan or method of making loans as set out in the above quoted letter in connection with the life insurance business, constitute a violation of Section 4605 of the Code of Alabama, 1923?

Section 4605 is as follows:

"4605. UNLAWFUL TO MAKE CONTRACT OTHER THAN AGREED IN POLICY; OR TO GIVE REBATES, ETC.—No life insurance company or agent thereof shall make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent, collector, or representative thereof, pay, allow or give or offer to pay, allow or give, directly or indirectly, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell or purchase or offer to give, sell or purchase, as inducement to insurance or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or anything of value whatever, not specified in the policy."

I am of the opinion that every matter as referred to in the statement of facts, must stand on its own merit. I will not say as a matter of law that the statute is or is not violated in all instances of life insurance being required in connection with loan transactions. It seems to me that there is a question of fact to be determined in each case. When the loan is the principal transaction, and the life insurance is a bona fide incidental requirement of the company, for the purpose of augmenting the loan security, a requirement made of all applicants alike, without discrimination, who may apply for a loan, then I am of the opinion that the transactions do not fall within the inhibitions of the Statute.

However, if the company or agents call upon a prospect for life insurance, and as a sales argument or inducement, makes the promise that if the policy of insurance is taken, the company will make long time mortgage loans to the insured, at a low rate of interest, and without charging any commission, then, I am of the opinion that this will constitute an "inducement," in fact and in law, and would be offensive to statute, *supra*, unless it is specified in the contract of insurance, and unless it applies to all persons alike who apply for insurance without discriminating. I, therefore, hold that the method of making loans in connection with the issuance of insurance policies as outlined in the statement of facts, is not offensive to the Alabama Statutes, and does not have to be set out in the policy of insurance.

Joyce on Insurance, 2. p. 2195; Spangler Brewing Company v. Phil. Life Ins. Co., L. J. 313.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 11, 1929.

The Adjutant General,
CAPITOL.

Dear Sir:

Line Officers—Election of. Officer not entitled to withdraw his ballot after having voted.

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your letter of April 10, 1929, in which you state that a question has arisen as to whether or not after an officer has voted in the election of a line officer, in the instant case the Colonel of a Regiment, he may withdraw his ballot. You inquire whether or not he should be allowed to withdraw his ballot, and cast another.

I am of the opinion that there is no provision of law, nor authority of the General Order No. 2, for such withdrawal of a vote already cast.

Section 25 of General Order No. 2 provides for the election of line officers.

Special Order No. 44, Adjutant General's Office, of date April 2, 1929, provides for the holding of an election. It provides that each officer of the regiment is entitled to vote. It also provides that the ballots are to be sealed in an envelope, and marked ballot, which envelope is to be mailed to the Office of the Adjutant General. It also provides that on April 16th the ballots will be opened by a committee in the presence of the Adjutant General.

Nothing contained in either the General Order mentioned, or the Special Order, providing for the holding of the election furnishes any authority for the withdrawal of a ballot already cast.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 11, 1929.

The State Prison Inspector,
CAPITOL.

Dear Sir:

State Prison Inspector authorized to order erection of kitchen, store rooms, guards' room, etc., to county jails.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of March 25, 1929. You state among other things that the question has arisen as to whether or not in the alteration of an old jail, or the construction of an entirely new building, the county authorities can be required to provide a building of more than the apartments as set out in Sections 215, 4856, 4877 and 3554 of the Code of Alabama, 1923.

You also cite the following additional sections of the Code of 1923, viz: Sections 212, 2220, both inclusive; Sections 4852, 4854, 4855 and 4860, all having reference to the erection and maintenance of jails, and the respective duties of the court of county commissioners and the State Prison Inspector.

I deem it unnecessary to again quote from all of the above named sections.

You request my opinion:

1. Must the requirements, as set out by the statute, be restricted to a building supplying only separate quarters for races, sexes and juveniles, be understood as constituting an adequate and sufficient jail?
2. Or can the State require provisions of such additional conveniences as a kitchen, store rooms, guards' room, etc., in order to secure an adequate and sufficient jail?

In reply to your first inquiry, it is my opinion that the requirements set out by the statute cannot be restricted merely to a building supplying only separate quarters for the races, sexes and juveniles.

In reply to your second inquiry it is my opinion that the State can require additional and necessary conveniences such as kitchen, store rooms, guards' room, etc.

Section 215 of the Code of Alabama, 1923, reads as follows:

"215. County jail; how constructed and arranged.—The county jail must be of sufficient size and strength to contain and keep securely the prisoners which may be confined therein; and must contain **at least** four apartments, properly ventilated, so as to secure the health of those confined therein; one for white men, one for white women; one for colored men, and one for colored women."

You will note that this Section simply states that the county jail must contain **at least** four apartments, but this does not necessarily mean that four apartments as described in said section would constitute an adequate and sufficient jail.

Under Article IV of the Code of Alabama, 1923, which contains Sections 4843 to and including 4883, the State Prison Inspector is given broad and

sweeping powers in connection with the erection and maintenance of county jails, prisons and almshouses. Under Section 4854 he is expressly authorized to order courts of county commissioners, and other like governing bodies, to put jails, prisons and almshouses in proper sanitary condition, and to make **such repairs, alterations and additions as he may deem necessary.** The State Prison Inspector is further authorized in said Section to order the erection of new buildings when deemed necessary, and the court of county commissioners, and like governing bodies, are required to comply with his order.

In the event you as State Prison Inspector want additions or new buildings, the county or municipal body or board may appeal to the Governor, who has final power to control the matter.

I am, therefore, of the opinion that under Article IV, and particularly under Section 4854 of the Code, you have the power and the authority, subject to appeal to the Governor, to order the construction of additional apartments to those mentioned in Section 215, Code of Alabama, 1923. Section 4854, *supra*, expressly authorizes you to order such repairs, alterations and additions as you may deem necessary. If a Court of County Commissioners should contemplate erecting a jail with only four apartments and in the judgment of the State Prison Inspector additional apartments are necessary, he has the authority under the statutes to order such additions made, subject to appeal to the Governor.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 16, 1929.

The Adjutant General,
CAPITOL.

Dear Sir:

Election of field officer, Alabama National Guard.

Staff officers not entitled to vote in election of field officer.

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your letter of April 15, 1929. You state that an election is about to be held for regimental commander, a field officer in the Alabama National Guard.

You inquire whether or not in such election staff officers and officers of the medical detachment of the regiment are entitled to vote.

I am of the opinion that such officers are not entitled to vote in such election.

The only provision as to the election of field officers by statute is to be found in Section 25 of an Act approved September 9, 1927, (General Acts, 1927, page 567 and 576).

It will be noted that Section 25 of the above mentioned Act provides that upon the expiration of the term of office of any field officer that the Governor

shall direct the commanding officer of the regiment, squadron or battalion to elect field officers to fill the vacancies. This Section further provides that fifteen days' notice must be given to the commanding officers of companies, troops, or batteries of the regiment, squadron or battalion in which said election is to be held and in the event there is a tie vote for such office the Adjutant General should cast the deciding vote.

The above provision of the Act of 1927 above referred to is indicative of the intention of the Legislature to exclude staff officers and officers of the medical detachment from participating in an election for field office. It is not provided that notice shall be given staff officers and officers of the medical detachment of the holding of the election.

The unbroken custom of the service is as much law, as the written law, and apparently in enacting the foregoing statute, the Legislature recognized the custom then prevailing; to-wit, that only elective officers should participate in the election of a field officer.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 17, 1929.

United States Department of Agriculture,
Farmers' Seed Loan Office,
Columbia, S. C.

Attention: Mr. L. E. Wite, Administrative Officer in Charge.

Dear Sir:

Recording and registration of mortgages—Pasting original mortgage on record kept by judge of probate does not comply with Section 6855 of the Code of 1923.

Opinion by Assistant Attorney General Smith.

I have your letter of April 9, 1929, in which you request the opinion of the Attorney General on the following question of law:

Is there any law in Alabama authorizing judges of probate to paste original mortgages on the records in lieu of recording and registration as provided by the Statutes of Alabama?

In answer to your question, I direct your attention to Sections 6853 and 6855 of the Code of Alabama, 1923, which are as follows:

"6853. RECORD OF CONVEYANCES—Conveyances of property, required by law to be recorded, must be recorded in the office of the judge of probate."

"6855. BOOKS KEPT FOR RECORDING, AND MODE OF RECORDING—Judges of probate are to procure at the expense of their counties, large and well-bound books, in which must be recorded in a fair hand, or by printing the same, or by the use of a typewriter, or other writing or printing machine, word for word, conveyances of property and

all other instruments authorized to be recorded, with the acknowledgments, proofs, schedules, plats, surveys, etc., belonging thereto; and at the foot or in the margin of the record of each conveyance or other instrument, the day of the month and year of the delivery of the same for record must be specified. The judge making the record of any conveyance or other instrument must certify on the same when it was received and recorded, and in what book and page the same is recorded, and must deliver it to the party entitled thereto, or his order, on the payment of the fees of registration; but the judge of probate may refuse to indorse "filed" on any conveyance or other instrument, or to record the same until such fees of registration are paid, and unless the conveyance or other instrument is witnessed, probated or acknowledged as required by this Code."

I am of the opinion that under the above quoted Sections of the Code, probate judges in this State are not authorized to paste original mortgages or copies thereof, on the record in lieu of recording same. This method does not meet the requirements of Section 6855, supra.

The purpose and scope of this Section of the Code covers the duty on the part of judges of probate as recording officers to see that the **original is transcribed in the record with exact correctness**; and to this end to compare, if necessary, the record when complete with the original.

McIntyre v. White, 124 Ala. 177.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 17, 1929.

The Judge of Probate,
Tuscaloosa, Tuscaloosa County, Alabama.

Dear Sir:

Deed tax and recording fee; no lien attaches or can be enforced where probate judges fails to collect tax and recording fee before filing and recording deed.

Opinion by Assistant Attorney General Haynes.

I have your letter of October 18, 1928, in which you state that occasionally you have the deed tax and recording fees paid by check which later turns out to be "bogus".

You request my opinion:

Is there a lien for these taxes and fees by which collection can be enforced?

It is my opinion there is not. There is no law that provides for such a lien.

Schedule 73 of Ala. Acts approved Oct. 14, 1923, (General Acts 1923 p. 318), requires among other things "that before receiving any deed, bill of sale or other instrument of like character for record the privilege license tax shall be paid." It is my opinion this anticipates the payment of such privilege tax in money, and if the Judge of Probate accepts a check for same he does so at his own risk. The Judge of Probate may demand his recording fee before recording such instrument, but if he fails to do this, and records the same, accepting a check in payment, and the check turns out bad, he, of course, still has a charge against the party for his fees, but it is only an account and collectable as other accounts.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 17, 1929.

The Board of Administration,
CAPITOL.

Dear Sir:

Attention: Hon. Hamp Draper.

Death Penalty—Prisoner should remain in custody of the sheriff, and in county jail, until case is finally acted on by the Supreme Court.

Opinion by Assistant Attorney General Haynes.

I have your letter of April 12, 1929, in which you state as follows:

"I am enclosing herewith death warrant in the case of Louis Smith alias Lewis Smith who was recently sentenced in the Circuit Court of Greene County to be electrocuted on May 31, 1929, and who was received at Kilby Prison April 5, 1929.

"It appears to the writer that this man having taken an appeal to the Supreme Court and the appeal not having been disposed of that this prisoner should be retained in the County Jail until the final disposition of such appeal. I will thank you to give me a written opinion as to whether or not this condemned prisoner should be received and retained at Kilby Prison until the appeal to the Supreme Court has been disposed of, or whether he should be retained in the County Jail of Greene County until the Supreme Court sets the date for the execution after his appeal has been considered and passed upon."

You request my opinion:

Should this prisoner be retained in the County Jail of Greene County until his case is finally disposed of by the Supreme Court or should he upon being convicted and sentenced to death by the Circuit Court of Greene County be within ten days transferred to Kilby for safekeeping under Section 5312, Code of Alabama, 1923?

It is my opinion, under the ruling in the Bachelor Case, 113 So. 67, the

prisoner should be retained in the County Jail of Greene County until his case is finally disposed of by the Supreme Court in case there is an appeal. In the Bachelor Case, supra, the Court held that the prisoner should on the affirmance of his case be carried before the Court that originally tried him, and there resentenced and the day fixed for his execution. Section 5311, Code of Alabama, 1923, is in part as follows:

"Whenever a person is sentenced to death, the clerk of the county in which the sentence is pronounced, shall, within ten days after the sentence has been pronounced, issue a warrant under the seal of the Court for the execution of the sentence of death * * * *".

You will note the above Section says "within ten days after sentence." This evidently means where an appeal is taken, and the judgment of the Court is affirmed, in case an appeal is taken, then there would be, of course, a suspension of the sentence pending the appeal. This suspension of sentence would in effect stay all further proceedings in the Circuit Court until the case was acted on by the Supreme Court, and in case of affirmance the Supreme Court having held that the Court that originally tried him should again sentence him, and fix the date of his execution, there would be no reason for issuing warrant under Section 5511, supra, and the warrant not being issued, then the provisions of Section 5512, Code of Alabama, 1923, could not be brought into operation.

Opinion of Attorney General to Pat Byrne, Sheriff Mobile County, March 4, 1927.

Therefore, I am of the opinion that the warrant provided for under Section 5511, supra, should not issue until the case is finally disposed of by the Supreme Court for the transfer of the prisoner to Kilby Prison for safe-keeping.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 18, 1929.

Superintendent of Education,
Double Springs, Winston County, Alabama.

Dear Sir:

Schools—Local Act of 1927 providing for election of county superintendents of education for Cullman and Winston Counties held constitutional.

Opinion by Assistant Attorney General Koonce.

I have your letter of March 11, 1929, in which you refer to the Local Act providing for the election of a county superintendent of education for Cullman and Winston Counties.

You request my opinion:

Is the Act referred to above constitutional?

I rendered an opinion on March 13, 1928, to the deputy solicitor of Cullman County in which I held the above Act constitutional. I am enclosing herewith copy of such opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 18, 1929.

The County Solicitor,
Roanoke, Randolph County, Alabama.

Dear Sir:

Municipal Corporation: Ordinance declaring any offense prohibited by the laws of Alabama to be a misdemeanor, is invalid.

Opinion by Assistant Attorney General Haynes.

I have your letter of March 8, 1929, in which you request my opinion as follows:

Is the following ordinance when properly adopted by a municipal corporation valid?

"BE IT ORDAINED BY THE CITY COUNCIL of the City of _____ that any person committing any offense within the city of _____ or within the police jurisdiction of the City of _____ prohibited by the laws of the State of Alabama, shall be guilty of a misdemeanor, and shall upon conviction be punished by a fine not exceeding \$100.00 and may be sentenced to imprisonment in the Municipal jail or to hard labor for the City not exceeding 30 days."

Section 1992, Code of Alabama, 1923, confers on municipal corporations the power to adopt ordinances and is as follows:

"1992. (1251) Power to adopt ordinances.—Municipal corporations may, from time to time, adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this chapter, and provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and enforce obedience to such ordinances by fine not exceeding one hundred dollars, and by imprisonment or hard labor not exceeding six months, one or both."

Evidently the above ordinance was passed under and by the authority given in the above quoted section. This statute confers on all municipalities the power to pass ordinances not inconsistent with the laws of the State, and to provide for their enforcement by fine not exceeding \$100.00 and by imprisonment or hard labor not exceeding six months, one or both. It is my opinion that the ordinance above set out is invalid in that it makes any offense prohibited by the laws of the State a misdemeanor. This is too broad in its

scope as it covers all criminal offenses whether they be misdemeanors or felonies. If you will redraw your ordinance and limit it to offenses which are declared to be misdemeanors under the laws of Alabama, it is my opinion it will be a valid ordinance.

Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 263.

Ex Parte Davis, 200 Ala. 436.

Section 1992, Code of Alabama, 1923.

Of course, you are aware that where one is tried and convicted of violation of a legal city ordinance, such conviction of the State statute which the city has in terms adopted as an ordinance.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 18, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Attorney General—All legal work and litigation concerning the interest of the State or any department thereof is under the control and direction of the Attorney General.

Employment of counsel to represent State or any department thereof shall be by the Attorney General. No appropriation of a department can be used for employing counsel.

Opinion by Assistant Attorney General Smith.

I have your letter of April 16, 1929, in which you request the opinion of the Attorney General on the following questions of law:

1. Whether or not the State Board of Education or the President of any Normal School has any legal authority to employ an attorney, or attorneys, for the purpose of preparing deeds, or investigating titles or abstracts to lands purchased by the State Board of Education for the State Normal Schools, and pay for said services out of any funds under the control of the State Board of Education?

2. Is there any authority of law authorizing the employment of an attorney by the State Board of Education or by the President of a State Normal School, to represent the Normal School or the State Board of Education in any capacity and pay for the same out of any funds belonging to the particular institution, or under the control of the State Board of Education?

3. Whether or not any of the fund appropriated in Sections 4 and 13 of an Act of the Legislature approved August 25, 1927, can be used for the purpose of paying attorney's fees?

4. Whether or not the original appropriation which is \$40,000.00 per

annum appropriated prior to the passage of the Act above referred to, can be used for the purpose of paying attorneys' fees?

5. Whether or not fees collected from students attending the State Normal Schools can be used for the purpose of paying attorneys' fees?

The five questions propounded by you can all be answered together, and in answering them, I direct your attention to Subsection 1 of Section 853, and Sections 854 and 872 of the Code of Alabama, 1923, dealing with the Attorney General's Department, which Sections are as follows:

"853. Article 1. He must give his opinion in writing, or otherwise, on any question of law connected with the interests of the state, or with the duties of any of the departments, when required by the governor, secretary of state, state auditor, state treasurer, superintendent of education, commissioner of agriculture and industries, examiner of public accounts, any member of the convict board, state health officer, public service commissioners, commissioner of conservation, or the state tax commission, or any other officer of department of the state when it is made by law his duty so to do; and he shall also give his opinion to the chairman of the judiciary committee of either house, when required upon any matter under the consideration of the committee."

"854. MAY INSTITUTE AND PROSECUTE CIVIL ACTIONS FOR THE STATE. The Attorney-general is authorized to institute and prosecute, in the name of the state, all suits and other proceedings at law or in equity, necessary to protect the rights and interests of the state."

"872. LITIGATION AFFECTING STATE AND EMPLOYMENT OF ATTORNEYS UNDER DIRECTION AND CONTROL OF ATTORNEY-GENERAL. All litigation concerning the interest of the state or any department thereof shall be under the direction and control of the attorney-general, and the employment of any attorneys for the purpose of representing the state or any department thereof shall be by the attorney-general with the approval of the governor; but nothing in this section or the four preceding sections shall prevent the governor from employing personal counsel whose compensation shall be payable out of the governor's contingent fund."

I am of the opinion that the above quoted Sections of the Code clearly mean that all legal work concerning the interest of the State or any department thereof, all be under the exclusive direction and control of the Attorney General, and the employment of any attorney for the purpose of representing the State or any department thereof, shall be by the Attorney General.

These provisions were enacted for the specific purpose of preventing the employment of attorneys by various departments, bureaus, boards and commissions of the State, and to place the entire legal work of the State in the office of the Attorney General and under his exclusive direction and control. No appropriation, therefore, made to a department by the State of Alabama, can be used for paying attorneys' fees except for those attorneys employed by

the Attorney General, in which event the payment is made from the Attorney General's appropriation in the manner provided by law.

In view of the above quoted statutes and what has been said, all of your questions are answered in the negative.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 19, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Bailiffs: Code Sections 6716, 10188, 10189 construed; not more than five bailiffs allowed in Circuit Court.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of March 30, 1929, in which you enclosed a letter and certain memoranda submitted to you by one of your Examiners.

It appears from your letter, and said enclosures, that the Circuit Judge of the Eleventh Judicial Circuit has certified that the services of twelve bailiffs for twenty-four days, and one bailiff for ten days, was necessary for the dispatch of business of the court during the recent September term of the Circuit Court of Lauderdale County.

It further appears that one of the bailiffs appointed was also Chief Deputy Sheriff of Lauderdale County at the time of his appointment.

Upon the above statement of facts you make the following inquiries, and request my opinion:

1st. Is there any authority of law to pay for the services of more than four bailiffs outside of the one who serves as bailiff for the Grand Jury, and the one person who serves as bailiff at each Circuit Court?

2. Would the Circuit Court have any authority of law, either under Section 6716 or 6717, or any other Section of the Code, to require the sheriff to employ more than four bailiffs outside of the one bailiff for the Grand Jury, and if he had authority to order the sheriff to supply more bailiffs, was there any authority of law to pay for the same out of the County Treasury above the number of four bailiffs, and the one additional bailiff to serve before the Grand Jury?

3rd. The Sheriff of Lauderdale County being on fees, and having no salary compensation, was it not his duty under Subdivision 1 of Section 10189 of the Code of Alabama, 1923, to furnish a sufficient number of deputies to execute the processes and orders of the Court, without the same being paid for by the County, besides the four bailiffs, and the one additional bailiff who waits on the Grand Jury?

4th. Was there any authority of law to summon, and pay for the Chief Deputy as a bailiff, he being paid a salary by the County.

5th. If there were no authority on the part of the Circuit Judge to order the employment, at the expense of the County, of more than four bailiffs, and the additional Grand Jury bailiff, was not the Commissioners' Court without authority of law to pass the claim for payment, and was not the Probate Judge without any authority of law, and is he not liable on his official bond for the drawing of a warrant and payment of the same?

In order to answer your first inquiry it is necessary to construe Section 6716 of the Code of Alabama, 1923, which reads as follows:

"6716. Bailiffs, constables, or deputies to attend court.—The sheriff of the county must summon one person to serve as bailiff for the grand jury; one to serve as bailiff in every circuit court, or division thereof, in which cases are being tried without juries when directed by the judge; and not exceeding four to serve in every court, or division, in which cases are being tried by juries, when the judge thereof certified that such bailiff or bailiffs are actually necessary."

The above Section requires the sheriff to summon one person to serve as bailiff for the grand jury. The sheriff is required to do this, and it is not necessary that said action be directed by the judge. The second clause of Section 6716 requires the sheriff to summon one person to serve as bailiff in every circuit court, or division thereof, in which cases are being tried without jury, when directed by the judge. The third clause of Section 6716, *supra*, merely provides that the sheriff must summon in jury cases any number of persons not to exceed four, when the Circuit Judge certifies the number of bailiffs actually necessary, but in no event more than four.

It is my opinion that there is no authority of law to pay for the services of more than five bailiffs at any one term of the Circuit Court of Lauderdale County.

The authority for summoning one of these five, without direction from the judge, is found in the first clause of said Section 6716, and the authority for summoning the additional four, under the certificate of the judge, is found in the third clause of the same Section.

Answering your second inquiry, I find no law in the Alabama statutes, or elsewhere, authorizing the Circuit Judge to require the sheriff to employ more than four bailiffs outside of the bailiff for the grand jury mentioned in the first clause of Section 6716, *supra*, at the expense of the county.

The sheriff is bound to execute certain legal papers, and to obey all lawful orders of the Court. The sheriff takes his office cum onere, and there is no authority of law for him to summon more than five bailiffs at the expense of the county.

In the event the business of the court demanded it, and it became necessary to employ additional bailiffs or deputies to attend to the business of the court with reasonable dispatch, it became the duty of the sheriff to employ at his own expense the necessary additional force, the sheriff being on a fee basis.

I am of the opinion that there is no authority of law for the employment in any event of more than a total of five bailiffs at any one term of the circuit court at the expense of the county.

The answer to your third inquiry is in the affirmative. Under Sections 10188 and 10189, Code of Alabama, 1923, it was the duty of the sheriff of Lauderdale County to furnish a sufficient number of bailiffs, or deputies, to execute the processes and orders of the court, since the Sheriff of Lauderdale County is on a fee basis. As stated hereinabove, he takes his office cum onere, and must employ at his own expense the number of bailiffs and deputies in excess of five that may be necessary.

Answering your fourth inquiry, I am of the opinion that a chief deputy may be appointed as a bailiff, but upon his acceptance of the appointment as bailiff under Section 6716, *supra*, he automatically vacates his office as chief deputy.

This office on March 20, 1928, rendered an opinion to the Sheriff of Winston County, in which he held, among other things, that: "The deputies paid by you may legally serve as bailiffs and draw compensation therefor, when the court certified that their appointment as bailiffs is actually necessary."

The above quoted part of this opinion is hereby overruled and withdrawn.

Ward v. State, 17 Ala. App. 170.
Mann v. Darden, 171 Ala. 142.

Answering your fifth inquiry, I have already expressed the opinion in answer to your second inquiry herein that the circuit judge had no authority to order the employment at the expense of the county of more than four bailiffs, and the additional grand jury bailiff.

Further answering your fifth inquiry, the Commissioners' Court was without authority of law to pass the claim of these additional bailiffs for payment, and the probate judge was without authority of law to issue a warrant to pay them.

Under the provisions of Section 321, Code of Alabama, 1923, I am of opinion that the act of the probate judge in issuing the warrant for the payment of the additional eight bailiffs was such an act as would render him liable on his official bond.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 19, 1929.

Register of the Circuit Court,
Greenville, Butler County, Alabama.

Dear Sir:

Trial Tax—Register of Circuit Court cannot remit or fail to collect tax.

Opinion by Assistant Attorney General Smith.

I have your letter of April 10, 1929, in which you request the opinion of the Attorney General on the following question of law:

As Register of the Circuit Court, is it permissible for me not to charge the trial tax fee provided for by law in cases filed on the Equity Docket of the Circuit Court?

The trial tax referred to by you is required to be collected as provided for in Section 4½ of the 1919 General Revenue Law (Acts 1919, p. 284), which is as follows:

"Section 4½. That a trial tax of three dollars be, and the same hereby is, imposed in each case, civil, criminal and equity, which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court, into the general funds of the State Treasury."

I am of the opinion that this tax is to be imposed in all cases civil, criminal and equity which go upon the docket of any Circuit Court, to be taxed and collected as other costs, and when the tax is collected it must be paid by you, as register of the court, into the general funds of the State Treasury, and you, as register, have no authority to remit or fail to collect this tax. The statute makes the collection of this tax **mandatory** and you have no discretion in the matter.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 20, 1929.

Superintendent of Insurance,
CAPITOL.

Dear Sir:

Domestic Insurance Companies: Not authorized to write life, fire, and casualty insurance policies with a capital stock of One Hundred Thousand Dollars.

Opinion by Special Assistant Attorney General Smith.

I have your letter of April 11, 1929, in which you request the opinion of the Attorney General on the following question of law:

Can a stock insurance company legally write life insurance, fire insurance, and miscellaneous casualty insurance in this State, issuing separate policies to cover each type of insurance so written, the company having only a paid up capital stock of One Hundred Thousand Dollars?

I assume that your question pertains to a domestic insurance company organized under the laws of this State.

I am of the opinion that no domestic fire insurance company can transact business in this State or write fire insurance policies until they have complied with Section 8358 of the Code of Alabama, 1923. This Section requires One Hundred Thousand Dollars paid up capital.

I am of the opinion that other domestic insurance companies, other than life and fire, must have not less than Fifty Thousand Dollars of capital stock before doing business in Alabama.

I am of the opinion that domestic life insurance companies doing business in this State must have One Hundred Thousand Dollars invested in approved securities as provided in Section 8357 of the Code of 1923, before commencing business. There seems to be no minimum or maximum amount of capital stock required by statute except that in no event can the capital stock be less than two thousand dollars. From what has been said above I am of the opinion that one domestic insurance company with a capital stock of One Hundred Thousand Dollars cannot legally write life, fire and miscellaneous casualty insurance by issuing separate policies to cover each type of insurance.

Section 6965, subdivision 4 of the Code of Alabama, 1923, has no application to corporations of the class we are here dealing with.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 22, 1929.

Superintendent of Banks,
CAPITOL.

Dear Sir:

Banks—Annual assessment of.

Opinion by Special Assistant Attorney General Brassell.

I have your letter of February 4, 1929, with enclosure. You request my opinion:

Are banks whose total resources are increased by deposits of the tax collector, required to pay assessment on the deposits of the tax collector where they are checked out in ten days after such deposits, said deposits being made around the last of December of each year?

In answer to your question, I am of the opinion that such bank will have to pay the assessment based upon their annual reports required to be made to the Superintendent of Banks next preceding January 1.

Code of Alabama, 1923, Section 6287 et seq.

The cited Section of the Code requires each bank, whether a private bank or a corporation carrying on a banking business in the State of Alabama, on the call of the Superintendent of Banks to pay annually into the treasury of the State, between the first day of January and the first day of April each year, or at such other date as the Superintendent of Banks may call for the same, to be used in defraying the expenses of the Banking Department of the State, twenty-five dollars and in addition thereto one hundredth of one per cent, or ten cents per thousand or fraction thereof from its total resources as shown by its last report to the banking department. The test is the total re-

source of the bank on January 1 or at the time the report and payment is required to be made under the statute.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 22, 1929.

State Superintendent of Education,
Montgomery, Alabama.

Dear Sir:

Municipal Corporations—Limitation of bonded indebtedness.

Opinion by Assistant Attorney General Smith.

I have your letter of April 4, 1929, in which you submit the following statement of facts:

"The mayor of Piedmont and delegation of citizens, including members of the board of education of that city, called upon me yesterday, seeking assistance and advice in the matter of erecting a new school building in that community. It seems that they have a bonded indebtedness of some \$72,000 and that five per cent of its assessed valuation is about \$85,000, but the indebtedness is largely for sewerage and waterworks which may be provided for through additional bonded indebtedness of three per cent over and above the five per cent allowed. (See Section 2282 of the Political Code.)"

Upon this statement of facts you request the opinion of the Attorney General upon the following question of law:

Whether or not the City of Piedmont can legally issue \$50,000 worth of bonds to be expended in erecting school buildings?

I cannot advise you whether or not the City of Piedmont can legally issue \$50,000 worth of bonds for school purposes or any other purposes. A matter of this kind is largely a question of fact to be considered in connection with Section 2282 of the Code of Alabama, 1923, which regulates and limits the indebtedness of municipalities of less than six thousand inhabitants in this State.

However, I am of the opinion that in arriving at the amount of the present indebtedness of the City of Piedmont which has a population of less than six thousand, the city would be allowed to deduct the debt already incurred for the following purposes: Construction or purchase of waterworks, gas, or electric lighting plants, or sewerage, or for improvement of streets, for which purposes an additional indebtedness, not exceeding three per cent, may be created. After these items have been deducted as provided in Section 2282 of the Code, then you can arrive at the indebtedness that would come in the five per cent limitation, and then definitely determine what margin of indebtedness

can be incurred in the future. This, as I have said before, is a question of fact, to be ascertained from the city's financial records.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 22, 1929.

The State Tax Commission,
CAPITOL.

Dear Sir:

License Tax: Street fairs operated by private individuals; Construction Section 15 of an Act approved July 22, 1927.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of October 2, 1928, in which you state among other things that a number of individuals are operating "street fairs" and claiming exemption from the street fair license under Section 15 of the Revenue Act of 1927.

You request my opinion construing Section 15 of an Act approved July 22, 1927, (Acts 1927, p. 156).

In reply to your inquiry, I am of the opinion that said individuals who are operating street fairs as private enterprises for profit are not exempt under Section 15 of said Act unless the street fair or carnival is operated under the auspices of "State Fairs", "County Fairs" or "District Fairs".

The exemption provided for in Section 15, *supra*, does not include private individuals operating so called "fairs" for personal gain, and they should be required to pay the regular license provided by law.

See opinion rendered Judge of Probate Marshall County, October 3, 1927.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

The Chairman,
Alabama Athletic Commission,
Birmingham, Alabama.

Dear Sir:

Alabama Athletic Commission not authorized to employ a stenographer.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of March 22, 1929.

You request my opinion:

Has the Alabama Athletic Commission authority to employ a stenographer and fix his salary, and has the Recorder of Permits and Licenses

the authority to pay for such stenographer out of the funds for which he is accountable to the State of Alabama?

It is my opinion that said Commission has not the authority to employ a stenographer, and fix his salary, and the Recorder of Permits and Licenses has no authority to pay the salary of said stenographer out of the funds for which he is accountable to the State.

That part of Section 5 of Act 134 approved July 1, 1927, which is pertinent to your inquiry, reads as follows:

(a) " * * * The Commission may appoint and remove at pleasure, a Secretary to the Commission, who shall perform such duties as the Commission may prescribe, and who shall keep a full, complete and up-to-date record of all the proceedings of said Commission, including all licenses and permits issued by the Recorder of Permits and Licenses, and all sums collected, and make a report thereof to the State Auditor annually, on or before the 15th day of January in each year."

Section 6 of said Act provides, among other things, that the Commission shall fix the salary of its secretary at a sum not exceeding one hundred dollars per month, which is paid out of any funds on hand for which the Recorder of Permits and Licenses is accountable to the State of Alabama.

Section 7 of said Act requires the Recorder of Permits and Licenses to pay into the State Treasury on or before certain fixed days in each year, all monies received, after first paying all salaries, accounts and other expenditures authorized by law and approved by the Commission. Section 11 of said Act reads as follows:

"Section 11. All licenses and permits issued by the Commission shall be on a form prescribed by the Commission, which shall be furnished to the Commission on its order at the expense of the State. All stamps, books and other incidentals used by the Commission shall be paid for on order of the Commission, by Recorder of Permits and Licenses, out of funds on hand, for which he is accountable to the State Treasurer."

It will be observed that nowhere in said Act can be found the express authority for the employment of a stenographer in addition to a secretary. Section 7 of this Act requires the payment into the State Treasury by the Recorder of Permits and Licenses of all monies received, after first paying all salaries, accounts and other expenditures authorized by law, and approved by the Commission.

Section 11, supra, simply provides that the form of licenses and permits shall be furnished the Commission, at the expense of the State, and that all stamps, books and other incidentals used by the Commission, shall be paid out of funds on hand, for which the Recorder of Permits and Licenses is accountable to the State Treasurer.

Neither the Alabama Athletic Commission nor the Recorder of Permits and Licenses can expend any sums of money unless expressly authorized by law to do so. The terms "all stamps, books and other incidentals" used in Section 11, supra, does not include a stenographer for the Commission.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

Superintendent of Education,
Wetumpka, Elmore County, Ala.

Dear Sir:

Schools—Election cannot be held to prolong county three mill tax.

Opinion by Assistant Attorney General Koonce.

I have your letter of March 30, 1929. You state that your present county three mill tax will expire in 1931. You also state that in order to continue your school building program, it will be necessary for you to sell warrants to finance the buildings.

You request my opinion:

Can an election be called for the purpose of re-voting the county three mill tax for a period of twenty years?

I assume you mean can such election be called now. In my opinion, your question must be answered in the negative.

I rendered an opinion on February 24, 1928, to the superintendent of education of Hale County in which I held that a school district has no legal authority to hold another election, while the right to make the levy exists under a former election. I am enclosing a copy of such opinion.

It relates to elections to re-vote district taxes, but the opinion is also applicable to elections to re-vote county taxes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Appropriations made by Act of the Legislature 1911, for Experimental Station should be kept in separate account.

I have your letter of April 9, 1929, with a letter from C. C. Brooks, Accountant, Alabama Polytechnic Institute, in which he requests the opinion of the Attorney General on the following question of law:

Can the funds appropriated by the legislature of 1911, (Acts 1911, pp. 5 to 8) for Experiment Stations of the Alabama Polytechnic Institute be placed in one fund with other moneys which are not limited in their application, and the resulting combined funds be then expended in the general experiment station work, or would the funds appropriated by said Act of 1911 have to be kept in a separate fund and be accounted for separately from other funds subsequently appropriated by the legislature for same purposes?

I am of the opinion that the Act of the legislature above referred to is very specific as to the exact amounts to be used for the several purposes set out in the Act, and these funds are restricted in their use to such purposes.

Section 5 of said Act provides: "That by or before March 1st of each year the director of the said experiment station shall make a full and complete report, through the Commissioner of Agriculture, to the Governor of Alabama on the work of the previous year in execution of this Act." It therefore follows that to comply with Section 5 of the Act it would be necessary to keep these funds in a separate account showing the expenditures and for what purposes they were made. The funds appropriated under this Act should not be commingled with other appropriations for similar purposes. In other words, this Act should be administered, and the funds expended and accounted for just as if this was the only Act in existence on this subject. To do this, I am of the opinion, that it would require a separate account in the bookkeeping system.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Convicts working on public roads; Cost of equipping, maintaining and preparing for use on the public roads to be paid out of the public Road and Bridge Fund.

Opinion by Assistant Attorney General Knight.

This is to acknowledge receipt of your letter of April 12th.

You state that a question has arisen as to whether or not the Convict Department must defray the expense out of the Convict Funds, which in effect are the General Funds of the State, of equipping, preparing for use on the public roads and bridges of the State convicts, and the maintaining of such convicts while at work on such roads and bridges. You also state that prior to the passage of an Act of August 23, 1927, (General Acts 1927, p. 348) and particularly Section 37 of said Act, the cost of equipping, preparing for use and maintaining convicts was paid out of the Public Road and Bridge Fund, which was created by the Act approved January 25, 1927, (General Acts 1927, p. 16). The question presented is whether or not since the passage of the act approved August 23, 1927, the Public Road and Bridge Fund may still be used for the purposes hereinbefore mentioned. The question is, was it the intention of the Legislature to supplant the provision of the Act approved January 25, 1927, in so far as it provided that the expense of equipping, maintaining, etc., of convicts should be borne out of the Public Road and Bridge Fund.

You request my opinion:

1st. Whether or not there is any authority on the part of the State Highway Department to claim reimbursement from the funds of the Convict Department for money expended under the terms of Section 10 of the Act approved January 25, 1927.

2. Whether or not subsequent to the Act of August 23, 1927, above referred to, the payment for preparing, equipping and maintenance of convicts working on the highways of the State was a proper charge against the Public Road and Bridge Fund.

3. Whether or not when convicts are used by the Convict Department to do excavation, grading, etc., for the Highway Department, the preparation and equipment of such convicts should be paid out of the Public Road and Bridge Fund.

I am of the opinion:

1. That there is no authority on the part of the State Highway Department to claim reimbursement from funds of the Convict Department for money expended out of the Public Road and Bridge Fund under the terms of Section 10 of the Act approved January 25, 1927 (General Acts 1927, p. 16).

2. That subsequent to the Act of August 23, 1927, the cost of preparing convicts, equipping and maintaining such convicts while working on the highways of the State is a proper charge against the Public Road and Bridge Fund.

3. That the cost of equipping, maintaining and preparing convicts to do excavation work for the Highway Department on road projects should be borne by the Public Road and Bridge Fund.

Section 10 of an Act approved January 25, 1927, (General Acts 1927, p. 16) provides that the proceeds of an excise tax imposed upon dealers, distributors, etc., of motor fuels shall be paid into the State Treasury in a Public Road and Bridge Fund. All uses to which this fund may be put are enumerated in Section 10 of the Act last referred to. This Fund is pledged primarily to provide the sinking fund which will retire within thirty-one years such additional Highway or Bridge Bonds that may be authorized and sold, and the payment of the annual interest on such Bonds. Any funds not so used are pledged to the following secondary purposes: constructing public roads and bridges and in maintaining public roads and bridges which may hereafter be constructed; equipping and preparing convicts for use upon the public roads and bridges of the State and for the maintenance of such convicts while so at work upon the roads and bridges and for compensating the State for the use of such convicts; and for such other use upon the public roads and bridges of the State as may be authorized by the State Highway Commission.

It is clear that the Legislature contemplated the abolition of the convict lease system and the use of the State convicts, or convicts under the control of the State, on the public roads and bridges. Therefore it may be said that the authorization of the use of this fund in preparing, maintaining and equipping convicts while working on the public roads and bridges is a specific provision relative to the general provision of constructing and

maintaining public roads and bridges with this fund. Hence I arrive at the conclusion that the use of this fund in equipping and preparing and maintaining convicts for the use and while working on the public roads and bridges is the primary use to which the fund should be put of the secondary uses enumerated.

It appears that the Legislature contemplated relieving the general fund of the burden of maintaining convicts while at work on the public roads and bridges and of equipping such convicts to work on the public roads and bridges.

The Public Road and Bridge Fund is a special fund of the State pledged to specific uses beyond which uses or an application to which uses the Highway Commission has no other control and so long as this fund is sufficient to retire Highway Bonds and to pay the annual interest thereon and to prepare, equip and maintain convicts working on the public roads and bridges it must be so applied and the Highway Commission is not authorized to use the same in accordance with the general enumeration until it has been applied first, to its primary use and second, to the primary use of the secondary uses.

Then came the Act of the Legislature of 1927 (General Acts 1927, p. 348). Section 37 of this Act at page 60 provides that the Highway Department may work convicts in the construction and maintenance of public roads and bridges, that they may work them by contract or agreement with the Board of Administration, providing that the charge for the labor of such convicts shall not exceed \$2.00 per day and no other expenses incurred by the use of such convicts shall be chargeable to the Highway Department, except such necessary tools and implements used in the construction, preparation and maintenance of such roads and bridges upon which such convicts are employed. This Act of the Legislature appropriates to the State Highway Department the entire net revenue derived by the State from the sale of motor vehicles, trailer and tractor licenses. This provision is tantamount to the creation of a special fund under the control of the Highway Department and I am of the opinion that the provision that the charge for the labor of such convicts shall not exceed \$2.00 per day and no other expenses incurred by the use of convicts shall be chargeable to the State Highway Department contemplated a charge against this particular fund. I am further of the opinion that the provision that the charge for labor of such convicts shall not exceed \$2.00 per day has application only where the convicts are worked as laborers upon the roads under the supervision and control of the Highway Department and has no application where the Convict Department undertakes by agreement or contract to do specific jobs for the Highway Department. In the latter case the Highway Department would be authorized to contract with the Convict Department or Board of Administration to do a particular piece of work the same as with a private contractor and in which event they would be authorized to enter into an agreement to compensate the Board of Administration for the job the same as they would a private contractor.

I am further of the opinion that the equipment originally provided out of the Public Road and Bridge Fund for convicts working on the roads and bridges or prepared to work on the roads and bridges is under the control of the State Board of Administration and not the State Highway Department because it must be borne in mind that the State Board of Administration is

responsible for the convicts and has control over them. It would be as reasonable to hold that the machinery and implements used in Kilby Prison in the shirt factory or upon the farms of the State was not under the control of the State Board of Administration as it would to hold that the machinery with which convicts are equipped to work the public roads is not under the control of the State Board of Administration.

The theory upon which this opinion proceeds is that the Public Road and Bridge Fund was intended by the Legislature to relieve the general fund of the burden of preparing and equipping convicts for work upon the public roads and in maintaining such convicts while so at work. That the Public Road and Bridge Fund does not become a fund under the control of the Highway Department until it has been applied to the specific uses to which it shall be put.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

The Board of Revenue,
Clayton, Barbour County, Alabama.

Gentlemen:

Paupers: Board of Revenue not authorized to support paupers outside of county almshouse.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of March 29, 1929, in which you state that the Board of Revenue of Barbour County has been making appropriations for the assistance of six paupers who are absolutely helpless, and if sent to the poorhouse, it would require at least two nurses and an additional building to care for them, and that the appropriation for their support is less than one-half what it would cost the county to take care of them in the poorhouse.

You request my opinion:

Is the Board of Revenue authorized to make an appropriation for the upkeep of paupers outside of the county almshouse?

I am of the opinion that the Board of Revenue of Barbour County is not authorized by law to make such appropriation. Section 31 of an Act approved September 9, 1927, (Acts 1927, p. 529) reads as follows:

"Sec. 31. A home having been established in any county or district, all persons, eligible to admission, who from any cause are unable to support and provide for themselves, and who have no one to care, support or provide for them, and are, or are likely to become, a charge upon the County, shall be committed to said home, and the Court of County Commissioners, or Board of Revenue, cannot appropriate any money for the support of paupers outside such home, except in cases as provided by provisions of this Act. After September 30th, 1929, the Court of County

Commissioners, or Board of Revenue of a county cannot appropriate money from the public funds for the support or maintenance of a pauper who is not an inmate of a County or district home, except in case of emergency, as provided for elsewhere in this Act, and in case of temporary relief on account of illness, such relief cannot be extended beyond a reasonable length of time."

It will be observed from a careful reading of the above quoted Section that after a home has been established in any county or district, a Court of County Commissioners or Board of Revenue cannot appropriate any money for the support of paupers outside such home except in certain cases provided for in said Act, which in my opinion does not include the case you mention.

It is, therefore, my opinion that the Board of Revenue is without authority to make an appropriation for the upkeep of paupers not in the county almshouse.

See opinion Attorney General to Chief Examiner, Department of Examiners of Accounts, March 5, 1929, copy of which is herewith enclosed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

Judge of Probate,
Athens, Limestone County, Alabama.

Dear Sir:

Deputy Solicitors—cannot draw pay from county for services as county attorney.

Opinion by Assistant Attorney General Smith.

I have your letter of April 10, 1929, in which you state as follows:

"Mr. Fred Wall, the Deputy Solicitor for this county has been appointed county attorney by the commissioners court at a salary of \$600.00 per annum."

Upon this statement of facts you request the opinion of the Attorney General on the following legal question:

Whether or not he can draw two salaries from the county?

In answer to your question, I desire to call your attention to sub-division 8 of Section 5498 and Section 5528 of the Code of Alabama, 1923, which are as follows:

"Section 5498. 8. All county solicitors, all circuit solicitors, and any solicitor of any court of record, shall give every county official opinions in writing on all matters connected with their respective offices except in suits against official's bonds. But courts of county commissioners or boards of revenue may retain or employ attorneys, when it is deemed

advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors."

"Section 5528. COMPENSATION UNDER THIS CHAPTER EXCLUSIVE.—The officers named in this chapter shall receive no compensation whatsoever for their services except the compensation hereinabove provided, and the compensation of the solicitors as provided in this chapter shall be the only compensation they shall receive, unless otherwise provided by law."

I am of the opinion that under Section 8 of Section 5498 of the Code, the deputy solicitor is duly bound to give every county officer opinions in writing on all matters connected with their respective offices, **except in suits against the officials' bonds.** But courts of county commissioners or boards of revenue may retain or employ attorneys when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors.

The duties of county attorney being already imposed on the deputy solicitor except in suits against official bonds, and the compensation fixed, the deputy solicitor cannot receive any other compensation for his services as county attorney under Section 5528, *supra*. However, this does not prevent the court of county commissioners from employing some other attorney than the deputy solicitor, if in their judgment it is deemed advisable or necessary and agreed on the compensation for his services.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

Clerk of Circuit Court,
Geneva County,
Geneva, Alabama.

Dear Sir:

Circuit Clerk—Duty to keep records and where same are damaged to recopy to prevent loss; is entitled to a reasonable compensation therefor.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of April 3rd, 1929.

You state that the recent flood ruined certain civil fee books in your office, records which you are required to keep permanently.

You inquire whether or not it is your duty as clerk of the circuit court to purchase new books and to recopy the records.

It is your duty to submit the necessity for such new books and recopy work to the court of county commissioners and if they deem it necessary they

shall purchase new books and it is your duty to then recopy the records, for which work you are entitled to reasonable compensation.

Section 6728 Code of 1923.

Section 6768 Code of 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1929.

The State Auditor,
CAPITOL.

Dear Sir:

Where land which has been bought in by the State at tax sale is sold by the State to a person who has no interest in such lands, the law to be followed is found in Sections 301 to 307, both inclusive, of Act No. 328, approved Sept. 15th, 1919.

Opinion by Assistant Attorney General Evans.

Your letter of April 17th, 1929, is acknowledged. You wish my opinion as to whether or not Section 3109, Code of 1923, must be complied with by you in sale of land, bought in by the State at tax sale, to a person who has no interest in such land.

In reply will say that the law with regard to such a sale is found in Sections 301 to 307 both inclusive, of Act No. 328, approved September 15th, 1919, (Acts 1919, pp. 371 and 372). These sections fully cover the requirements of the law with regard to such a sale. These sections of the 1919 Revenue Act constituted the entire law upon the subject at the time of the adoption of the Code of 1923.

The Code of 1923, was adopted and enacted by Act No. 160, approved August 17, 1923, (Acts 1923, p. 127). Section 3 of this Act reads as follows:

"No statute which applies or relates or which was intended to apply or relate to but one county, one municipality, or one other political subdivision of the State, though such statute might, strictly speaking, be classed as a general law, shall be repealed or affected in any manner by the adoption of this Code or the failure to incorporate it in the Code as part thereof; but such statute shall remain unrepealed and be given the same force and effect as if it had been incorporated in the Code as part thereof. Likewise no statute applying to the revenue laws of the State, or to taxation, to schools, or to education, to agriculture, to horticulture, or other industries, or the game and fish department of the State, or relating to such subjects, shall be repealed or affected in any manner by the adoption of this Code, or by the failure to incorporate such statute as a part thereof."

All of the sections of the 1919 Act named relate to taxation, and were incorporated in the Revenue Act of 1919, as part thereof. Nothing in the 1923 Code can have the effect of changing or repealing said Sections of the

1919 Act. If such would be the literal effect of the language used in Section 3109 of the Code, then Section 3109 of said Code has never been adopted as part of the Code.

Dorlan vs. Blan, 118 So. 682 (Ala. App.)

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

The amount of license required of abstract companies doing business in the City of Decatur since passage of Local Act No. 15, (Acts 1917, p. 1).

Opinion by Assistant Attorney General Evans.

This acknowledges receipt of letter from G. W. Wilson, Assistant Examiner of Accounts, of date April 16th, which you refer to me for reply. He states the following:

Local Act No. 15 approved February 4, 1927, (Local Acts 1927, p. 1) combines into one municipal corporation under the name "Decatur" the territory of three previously existing corporations, viz., Decatur, having a population of 4,752; Albany, having a population of 7,652; and Fairview having a population of 368, according to the last preceding United States census.

You wish my opinion as to the proper license to be paid by abstract companies and persons engaged in furnishing abstracts of titles in said city formed of the territory of the three previously existing municipalities.

In reply will say that the license required of abstract companies and of persons engaged in the business of furnishing abstracts of titles is found in Schedule 1 of Section 361 of the Revenue Act 1919, (Acts 1919, p. 395). It reads as follows:

"Abstract companies and persons engaged in furnishing abstracts of titles, in towns or cities of twenty thousand inhabitants or more, fifty dollars; in towns or cities of from ten to twenty thousand inhabitants, twenty-five dollars; in towns or cities of from five to ten thousand inhabitants, ten dollars; in towns or cities of less than five thousand inhabitants, and in all other places, five dollars."

The last sentence in Section 377 of the Revenue Act 1919, (Acts 1919, p. 445) reads as follows:

"In all cases where the amount of the license is rated according to the population of the town, city or county, the population of such town, city or county as fixed by the last preceding United States census shall govern."

In this, as in all statutes, it is necessary to ascertain the legislative intent. We have here the territory of three adjoining municipalities covered into one municipal corporation. Each of these former municipal corporations has its census in the last United States Census. Must the census of the corporation whose territory embraces the territory of the three former municipalities be considered as the combined census of the three, that is, twelve thousand seven hundred and seventy two or must it be considered as the census of the City Decatur as found in the last preceding United States census, to-wit: four thousand seven hundred and fifty-two. If the city had taken the name of Fairview, would the population, for purposes of license for abstract companies, be considered as three hundred and sixty-eight.

If the present city had been given the name of Jonesboro would it be considered as having no population according to the last preceding United States census and, therefore, fall into the five dollar class.

In such a case as the one under consideration, where the population of the several parts of a given territory is fixed by the last preceding Federal Census, and all that is necessary to do to ascertain the population of the whole of such territory according to the last preceding Federal Census is to add together the populations of the several parts, then the sum total of such population constitutes, in my opinion, the population upon which the license is based.

On the other hand if either of the parts of such territory has no population ascertainable from the last preceding Federal Census, then such part must be omitted in determining the population for such license. Such, in my opinion, is necessarily the legislative intent in such a case.

I am, therefore, of the opinion that abstract companies doing business in the present City of Decatur should pay on the basis of cities having from ten to twenty thousand inhabitants.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 24, 1929.

Judge of Probate,
Birmingham, Jefferson County, Alabama.

Dear Sir:

Clerk of Probate Court not a county officer within the meaning of Section 2658 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Evans.

Your letter of January 11, 1929, was duly received.

You ask a reconsideration of the opinion rendered by me to the Judge of Probate of Dale County of date December 18, 1928.

In reply will say that after consideration of the matter, I am of the opinion that the opinion to the Judge of Probate of Dale County is correct.

It is my opinion that it was not the legislative intent that Section 2658

of the Code should apply to the bond of the Chief Clerk of the Probate Court. In my opinion, Section 9593 is purely for the benefit and protection of the Judge of Probate. The Judge of Probate fixes the amount of the bond and approves the bond. The Judge of Probate may employ a Chief Clerk or not as he sees fit. He may require a bond of one or of a million dollars. Besides, the Clerk of the Probate Court has, according to my observation, never been regarded as one of the county officers; but merely as an employee of a county officer having certain powers conferred upon the position occupied by virtue of his employment. While such clerk is a public officer within the meaning of the criminal statute, which forbids any public officer from purchasing, dealing or trafficking "in any claims payable out of the county treasury, or out of the fine and forfeiture fund of the county," (Scruggs vs. State, 111 Ala. 60) he, in my opinion, is not a county officer within the meaning and intent of said Section 2658. In my opinion, he is not a county officer within the meaning of Section 175 of the Constitution of Alabama.

In my opinion "county officers" as used in said Section 2658 of the Code has the same meaning and intent as has the same words as used in said Section 175 of the Constitution.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 24, 1929.

The Commissioner,
Department of Game and Fisheries,
CAPITOL.

Dear Sir:

Hunting license—Non-resident is not required to procure hunting license of any nature to hunt on lands that he owns or rents in the State of Alabama.

I have your letter of April 4, 1929. In it you call attention to what you believe to be an apparent ambiguity in Section 15 of an Act approved September 29, 1923 (General Acts 1923, p. 777).

You request my opinion:

Is a non-resident of Alabama required by law to procure a hunting license to hunt on lands he owns or rents in the State of Alabama?

In my opinion, a non-resident of Alabama may legally hunt on lands he owns or rents in Alabama without procuring any hunting license to do so.

I see no apparent ambiguity in the Section of the Act referred to by you. The proviso in the two last clauses of said Act were intended to pervade the whole section and clearly exempts a non-resident of Alabama from the re-

quirements as to taking out a hunting license to hunt on those lands of which he is the owner or the landlord.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 27, 1929.

The State Tax Commission,
CAPITOL.

Motor Vehicles—Proper license for wreckers.

Opinion by the Attorney General.

Gentlemen:

I have your letter of March 9, 1929, in which you state that you have reports from several of your license inspectors to the effect that garages in many instances are refusing to take out tags for motor vehicles commonly known as "wreckers;" that you have always supposed that a wrecker was a truck, that is to say that it is a motor vehicle being used as a truck, and that the wrecker apparatus is not a part of the vehicle but is a separate mechanism carried thereon.

Upon this statement of facts you request my opinion:

What type of license is the proper license for a vehicle commonly known as a "wrecker," and which you describe above.

In my opinion a "wrecker" is a truck within the meaning of Section 17 of an Act approved July 22, 1927 (General Acts 1927, p. 157). I have so held in an opinion dated April 25, 1929, to the Judge of Probate, Henry County, Alabama, copy of which is being sent to you. In this connection I also invite your attention to an opinion dated April 25, 1929, to the License Inspector, Mobile County, Mobile, Alabama, copy of which is also being sent you.

The license for motor trucks is set forth in Section 17, of the Act supra, and said license tax on motor trucks is based on two propositions, viz:

First. Manufacturer's tonnage as opposed to the actual transporting capacity of the truck.

Second. Whether or not the excise tax has been paid on motor fuels to be used in the truck.

By "manufacturer's tonnage" is meant ordinarily the carrying capacity of the truck as determined by the manufacturer, and not as determined by some purchaser.

Section 12 of an Act approved September 13, 1923 (General Acts 1923, p. 285) prescribes the license tax on automobiles and motor cars "kept for private use." A motor vehicle commonly known as a "wrecker," being a vehicle devoted to a commercial use, certainly does not come within the license

tax schedule for automobiles and motor cars kept for private use within the meaning of Section 12 of the Act last above cited. A "wrecker" is a service car, and hence cannot carry a "demonstration tag" within the meaning of Section 21 of the Act last above cited.

As I understand it, the manufacturers of trucks throughout the country, determine according to set standards the tonnage which the trucks may safely carry. A truck may be purchased without a body attached to it but it still carries a tonnage rating by the manufacturer, and that tonnage rating as explained above, determines ordinarily the minimum license tag or tax properly chargeable under Section 17 of the 1927 Act, *supra*. Touring cars, sedans, coupes, and other such motor vehicles designed ordinarily for private use, when kept for private use, come under Section 12 of the 1923 Act, *supra*, and the tax properly chargeable is based upon horse power instead of tonnage or carrying capacity. But one may take a vehicle of the latter class and strip from it the body and convert it into a truck, and there being ordinarily no manufacturer's tonnage rating on the vehicle as originally constructed or as reconstructed, the minimum tax properly chargeable under Section 17 of the 1927 Act would be that for a truck of less than one ton, but in no event may one use upon such a converted vehicle a tag for less tonnage than that actually carried for to do so would be violating Section 81 of an Act approved August 23, 1927 (General Acts 1927, p. 379).

In some instances garage men take motor trucks, and without changing the construction thereof, put thereon a hoisting or wrecking device. In such an instance the minimum proper tag license due is based upon the manufacturer's tonnage of the truck as originally constructed, and the wrecking device constitutes the load or a part of the load. But if the truck be a truck the manufacturer's tonnage of which is one ton and less than two tons, and the wrecking device weighs more than two tons, it being my view that the wrecking device is a part of the load or the load, then, in such instance, the proper truck tag would be based on the load carried.

In the case of touring cars, etc., converted into wreckers, the proper truck tag would be that for a truck of less than a ton if the wrecking device and remainder of the load is less than one ton, but if the wrecking device and remainder of the load is one ton or more, then the proper tag would be based on the increased tonnage, as shown by the schedule of Section 17 of the 1927 Act *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

Tax Assessor,
Fayette, Fayette County, Alabama.

Dear Sir:

Schools—three mill district tax, levy on property within district.

Opinion by Assistant Attorney General Koonce.

I have your letter of March 12, 1929. You state that a tax payer in your county owns two hundred acres of land and that eighty acres of this land is located in a three mill school district. You also state that the tax payers residence is located on this eighty acres, but that his barn and lot buildings are just outside the eighty acres.

You request my opinion:

Should the tax payers mules, horses, cows, hogs, wagons, etc., over and above all exemptions be included in the assessment for the three mill district tax?

In my opinion the property which you mention should not be included in the assessment for three mill district tax, if said property is not located within the tax district.

I rendered an opinion on June 26, 1924 to the tax assessor of Dale County (Opinions of Attorney General, Vol. 2, p. 449) in which I held that whenever a district school tax has been voted the court of county commissioners or other governing body shall levy said special tax and cause the tax assessor to assess the same on the taxable property in said district.

Section 280, School Code, 1927, contains the provision that whenever the electors vote to levy a school tax the court of county commissioners or other governing body shall levy said special tax and cause the tax assessor to assess the same on the taxable property.

Section 287, School Code, 1927, contains the provision that whenever a tax is levied for school purposes it shall be the duty of the tax collector to collect such tax in the same manner as the taxes of the State are collected.

Statutes imposing taxes must be strictly construed. The property which you mention in your letter is not located within the school district. It necessarily follows that such property cannot be taxed because it is not taxable property within the district.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

President, Alabama Public Service Commission,
Montgomery, Alabama.

Dear Sir:

Motor Carriers—fees to be collected on intrastate business done in this State.

Opinion by Assistant Attorney General Smith.

I have your letter of March 15, 1929, in which you enclose a letter addressed to you by J. O. Hamby, Railway and Motor Carrier Accountant of the Alabama Public Service Commission, in which he requests an opinion as to the amount of fees that should be collected by the commission from motor carriers operating in this State, said fees being provided for in Section 7 of the Alabama Motor Carrier Act of 1927, which in part is as follows:

“Every motor carrier operating under the provisions of this Act shall, between the first and fifteen days of January, April, July and October of each year, file with the Commission a sworn statement showing its gross operating revenues from its **intrastate business** for the preceding three months, or portions thereof, and shall pay to the Commission a fee of one percentum of the amount of such gross operating revenues at the time said statement is filed.”

I am of the opinion that the above quoted provision of the Motor Carrier Act limits the fees to be collected from motor carriers operating under this Act in this State to a fee of one percentum of the amount of gross operating revenues from its **intrastate business**. This means revenues collected on the business originating and ending in this State. It seems to me that it was the clear intention of the legislature to tax the intrastate business and nothing more.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

The Adjutant General,
Montgomery, Alabama.

Dear Sir:

Air Corps—pay of men in. Pay of officers and enlisted men of Alabama National Guard.

Opinion by Assistant Attorney General Rayburn.

I have your letter of April 8, 1929.

You request my opinion:

1. Are enlisted men of the Air Corps who are called into active service of the State entitled to flying pay in addition to other pay au-

thorized in Section 58 of an Act approved Sept. 9, 1927, (General Acts 1927, p. 589)?

2. Are officers and enlisted men of the Alabama National Guard who are drawing a regular salary from the State of Alabama entitled to pay for active service in the State, as set out in the above cited Act, in addition to their regular salary which they are drawing from the State?

In answer to your first inquiry, I advise you that enlisted men of the Air Corps when called into active service of the State are not entitled to flying pay in addition to the pay which is authorized in Section 58 of the Act approved September 9, 1927, (General Acts 1927, p. 589). I find no provision of law for compensating members of the Alabama National Guard for flying.

In answer to your second question, I advise you that officers and enlisted men of the Alabama National Guard, when called into active service of the State, as defined and provided in the Act approved September 9, 1927, entitled "an Act to regulate and provide for the military and naval forces of the State of Alabama are legally entitled to the pay which is set forth in Section 58 of said Act, and no other. In computing the salary of officers and men who have been called into active service of the State, full pay is allowed for each fractional part of a day. In no event is there authority for paying the regular salary, and, at the same time, paying for active service in addition thereto.

Section 58 of the Act approved September 9, 1927, (General Acts 1927, p. 589) provides as follows:

"Sec. 58. PAY OF OFFICERS AND MEN FOR STATE SERVICE.—Officers and enlisted men, when employed in the active service of the State, as defined and provided in this Act, beginning on the day they assemble at their armories, or other designated places, until the day they have returned thereto and been properly relieved, inclusive, fractional parts of a day counting as a full day (a day beginning at midnight and ending the following midnight), shall receive pay and allowances as follows: Officers shall receive the same pay and allowances which officers of like rank in the United States Army are entitled by law to receive; and in addition the cost of hire of one horse and one forage ration, when required to be mounted, when the same not furnished by the State. Enlisted men: * * * Each enlisted man shall be entitled to one ration per day on commutation "of same at the actual cost of subsistence, under such regulations as the Governor may prescribe. The pay and allowances authorized by this section shall be paid out of the general treasury, and not from the military appropriation hereinafter provided for organization, maintenance, support and up-keep, on warrant of the Auditor on organization pay rolls or vouchers for individuals as may be required by the Governor as Commander-in-Chief, accompanied by copies of the orders authorizing service. Before payment, pay rolls and vouchers shall be certified by the Adjutant General and approved by the Governor."

Yours truly,

CHARLIE C. McCALL,

Attorney General.

April 29, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Constitutionality: Act approved September 24, 1929, (General Acts 1919, p. 692) held unconstitutional.

Opinion by Special Assistant Attorney General Cobb.

I have your letter of March 20, 1929, in which you state, among other things, that by an Act of the legislature approved September 24, 1919, the per diem of members of the Court of County Commissioners and Board of Revenue in Counties having not less than 30,900, and not exceeding 30,975 population according to the last or any future census, was increased. You state further that the official census of Lauderdale County of 1920, shows a population of 39,556, and that you are not advised as to whether or not the Act above mentioned was advertised as a local bill.

You request my opinion:

1. Is the Act above mentioned constitutional?
2. If said Act is constitutional, are the members of the Court of County Commissioners of Lauderdale County entitled to claim the benefits of increased per diem under the terms of this Act, where the official census shows that Lauderdale County had a population in 1920 of 39,556?
3. Where the population of Lauderdale County does not come within the limits fixed by the Act, would the members of the Court of County Commissioners be required to collect their per diem and compensation under the general law of the State?

In reply to your first inquiry, I am of opinion that this is a local law, and that it is unconstitutional and void. I have examined the Senate Journal, and find that no notice was given, and no proof was made of the intention to apply for passage of said Act as required by law. The Act is, therefore, unconstitutional for the reason that it fails to comply with the requirements of Section 106 of the Constitution of Alabama.

This is an attempt to pass a local law under the guise of a general law as it clearly shows on its face that the classification was purely arbitrary.

Reynolds, et al., v. Collier, 85 So. 465.

In reply to your second inquiry, I am of the opinion that even though the Act itself were constitutional and valid, that Lauderdale County would not come within the provision of said Act for the simple reason that the Federal census of 1920 shows Lauderdale County has a population much greater than the maximum limit fixed by said Act.

In reply to your third inquiry, I am of the opinion that even though the Act were constitutional and valid, the members of the Court of County Commissioners of Lauderdale County would receive their per diem and compensation under the general laws of the State, for the reason that Lauderdale County does not come within the classification mentioned in the said Act.

See Opinion Attorney General to County Solicitor, Bibb County, June 17, 1927, (Office Edition Vol. 2, p. 194).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

The County Superintendent of Education,
Greenville, Butler County, Alabama.

Dear Sir:

Schools—Trustees for—When and how used.

Opinion by the Attorney General.

I have your letter of April 26th. In it you state that the former County Superintendent of Education appointed school trustees for the rural schools of your county last summer, and that you are frequently being asked to appoint new ones this summer. You request my opinion:

1st. Is it legal for the County Superintendent of Education to appoint new school trustees for the rural schools of Butler County this summer?

2nd. Is it lawful for the County Superintendent of Education to select two school trustees for the Forest Home School from other than the Forest Home community, inasmuch as this new consolidated school is made up of several adjoining communities?

In answer to your first question, will state that the County Superintendent of Education is not legally concerned with the appointment of school trustees for any school. Under Section 133, Alabama School Code, 1927, it is the duty of the County Board of Education and not the County Superintendent of Education, to appoint, for every school in the county, from six discreet, competent, reliable persons of mature years, **nominated by the patrons of the school**, three persons residing near the school house, and having the respect and confidence of the community, to serve as trustees of the school. Said section also defines generally the duties of said trustees. You will observe, therefore, that it is not your duty to nominate trustees, but it is the duty of the patrons of the school to nominate them. The only thing you are interested in, from a legal standpoint, is seeing that the patrons of the several schools send in their nominations to the County Board of Education.

Further, it appears that the law does not specify when said trustees shall

be appointed, nor for what length of time. Therefore, the County Board of Education when properly presented nominations, may appoint at any time, and since there is no specific provision on the subject, the County Board of Education may revoke the appointments at any time, for, it is a general rule of law, that, where there is no provision to the contrary, the power to appoint to office carries with it the power to discharge therefrom.'

In answer to your second question will state that, in my judgment, in view of the legislative intent expressed in Section 133, Alabama School Code, 1927, the County Board of Education may not appoint as school trustees for the Forest Home School, persons who do not reside near the school house. As stated in my answer to your first question, you have nothing to do with the selection of the trustees for any school.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

The Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.
Attention: Mr. B. P. Livingston.

Dear Sir:

Agricultural Code 1927—Provision requiring dealers in nursery stock to secure certificate, construed.

Opinion by Assistant Attorney General Koonce.

I have your letter of April 2, 1929. You state that a number of landscape architects in this State buy nursery stock for their plantings, and charge their customers for the plants, and for setting them, and also for the drawing of plans.

You request my opinion:

Are the landscape architects mentioned above, dealers in nursery stock within the contemplation of Section 291, subsection (f) of the Agricultural Code of 1927 and should such architects be required to pay a fee and secure a dealer's certificate?

In my opinion, your question must be answered in the affirmative.

Section 291, sub-section (f) Agricultural Code 1927 (Agricultural Code 1927, p. 126) defines a "dealer in nursery stock." The landscape architects referred to by you buy nursery stock and resell it. They must, therefore, secure the certificate and pay the fee required by Section 292, Agricultural Code 1927, (Agricultural Code 1927, p. 126).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

The Chief Examiner,
Department of Examiners of Accounts,

CAPITOL.

Dear Sir:

Physician's fee for examining witness.

Opinion by Assistant Attorney General Rayburn.

I have your letter of March 30, 1929, together with a copy of a claim which Dr. W. B. Turner has presented to the Commissioners' Court of Lauderdale County for payment. Said claim reads as follows:

"____FUND

OF

LAUDERDALE COUNTY
DEBTOR
TO W. B. TURNER

Trip to Athens with Sheriff, 3-22-28, \$25.00.

Signed: W. B. Turner.

Sworn to and subscribed before me this April 2, 1928.

J. I. McCLURE, Judge of Probate."

You state that said claim, after presentation to the Commissioners' Court of Lauderdale County, was paid by an order of said County. Said claim was in favor of Dr. W. B. Turner, a physician who was ordered by the Circuit Judge to accompany the Sheriff of Lauderdale County to Athens in Limestone County, for the purpose of making a physical examination of a witness who claimed his inability to attend Circuit Court on account of illness.

You request my opinion:

1. Was there any authority of law on the part of the Circuit Judge to direct and compel the physician to go with the Sheriff of Lauderdale County to Limestone County for the purpose stated, and was there any authority of law to pay such claim against the county?

2. If there were no authority of law, is the Judge of Probate liable on his official bond for the drawing of his warrant in payment of said claim, under Section 321, Code of Alabama, 1923, or is the County Depository liable for the wrongful payment of such claim?

In answer to your inquiry, I advise you that there is no authority of law which authorizes the Circuit Judge to do what was done in this case. Certainly there is no authority of law for the payment of such a claim. It is my opinion the Probate Judge is liable on his official bond for the amount paid. The County Depository is not liable for the wrongful payment of this

claim for the reason that said Depository is not charged with the duty of ascertaining the legality of warrants which are drawn by duly constituted authority on the funds intrusted to said depository.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

The Judge of Probate,
Wedowee, Randolph County, Ala.

Dear Sir:

Insurance on county employees—
County not liable for injury to employees.

Opinion by Assistant Attorney General Rayburn.

I have your letter of March 13, 1929. You state that the County Court of Commissioners has been carrying liability insurance on some employees of Randolph County, and that the premium on the policy which you have been carrying is about \$240.00 per annum, which covers indemnity insurance on all of the men who are working for said county, on tractors, graders and other machinery.

You request my opinion:

1. Has the county the legal right to insure said employees, and if so, would the premium on said insurance be a proper charge against the county?
2. Would the county be liable for injury to said employees, in the event that no insurance was carried on them?

In answer to your inquiry, I advise you that there is no authority of law which authorizes the county to take out insurance of any nature on the employees of the county. There is no statute which imposes liability upon the county for the tortious acts of its officers, agents, servants and employees. I, therefore, advise you that the claim for insurance is not a proper one, and should not be paid, and you, as Probate Judge, would be liable on your official bond for such an expenditure.

15 Corpus Juris, p. 570

Jones v. Jefferson County, 206 Ala. p. 13.

Hamilton v. Jefferson County, 96 Sou. p. 628.

Opinion of Attorney General April 4, 1929, to the Judge of Probate,
Jackson County, Scottsboro, Ala.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

Hon. J. N. Mullins,
Circuit Solicitor,
Dothan, Alabama.

Dear Sir:

Expenses incurred by J. M. Kirkland for the removal of one Oscar Senn from Atmore, Escambia County to Dothan, Houston County, charged with crime.

Opinion by Assistant Attorney General Haynes.

I have your letter of March 20, 1929, and also your explanatory letter of March 30, 1929, in which you state that one Oscar Senn was arrested in Escambia County for disposing of property on which there was a lien, and that he was lodged in jail at Atmore and later removed from Atmore to Dothan in Houston County for trial. You state he was tried and convicted on said charge. You further state that there was no order of removal from the Judge of Probate of Houston County endorsed by the Solicitor for the removal of Senn from Atmore in Escambia County to Dothan in Houston County. You also state that a reward of \$50.00 was offered by Mr. Kirkland and paid by him for the apprehension and arrest of Senn.

You request my opinion:

Can the State of Alabama reimburse Mr. Kirkland for reward offered and paid by him and for the expenses incurred in the apprehension, arrest and transfer of the defendant from Atmore to Dothan for trial.

It is my opinion it cannot. Section 3743, Code of Alabama, 1923, sets out the duty of an arresting officer when arresting an absconding defendant wanted in another county. This Section is as follows:

"Duty of Arresting Officer to Commit Prisoner to Jail or Guardhouse.—The arresting officer, immediately after the arrest of said prisoner or prisoners shall commit him or them to any jail or guardhouse nearest to the place of arrest, and notify the sheriff of the county in which the said prisoner or prisoners are triable, of the fact that he has committed him or them to jail."

Section 3744, Code of Alabama, 1923, sets out the duty of the sheriff of the county on being notified of the arrest and incarceration of the defendant in another county and is wanted in his county. This section is as follows:

"Sheriff, Being Notified, Applies to Judge of Probate for Removal Order.—The sheriff, upon receipt of such notification, shall apply to the judge of probate of his county for a removal order, having first secured the recommendation of the presiding judge of the county, or circuit solicitor, certifying that in the interest of justice the said order should be granted or issued."

Section 4162, Code of Alabama, 1923, provides for the offering of rewards in cases of this character by the Governor of the State and is as follows:

"Governor Authorized to Offer Reward for Absconding Felon.—Whenever a felony has been committed and the perpetrator thereof is unknown, or when, being known, he absconds after being arrested, or escapes from custody, either before or after conviction, the governor is authorized, in his discretion to offer by proclamation a reward, not exceeding four hundred dollars for the apprehension or re-arrest of such person within five years from the date of such proclamation; and to draw his warrant on the state treasurer for the amount of such reward, when necessary to be paid."

I gather from your statement of facts that none of the preceding sections cited above were followed in this case. That is to say, that the Sheriff or other arresting officer at Atmore did not notify the Sheriff of Houston County that he had apprehended Senn in his county and had arrested him and confined him in jail to await his transfer to Houston County. Before the transfer of Senn the Sheriff of Houston County failed to get an order from the Judge of Probate of Houston County endorsed by the Solicitor for the transfer of the defendant from Escambia County to Houston County as is provided by Section 3744, *supra*. The facts as detailed by you show that the reward paid for the apprehension and arrest of the defendant was an individual matter of Mr. Kirkland and was not authorized by the Governor of Alabama under Section 4162, *supra*.

Central of Georgia R. R. Co. vs. Chatam, 85 Ala. 292.
Snead vs. State, 18 Ala. App. 437.

All costs and fees are of statutory origin and penal and must be strictly construed. When a fee or cost is claimed there must be some statute providing same and this statute must be strictly followed.

See Section 3734, Code of Alabama, 1923.

Lee vs. Smyley, 16 Ala. 773, Dent vs. State, 42 Ala. 314, Trout vs. Morgan County, 109 Ala. 162.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1929.

The Judge of Probate,
Abbeville, Henry County, Alabama.

Dear Sir:

Motor Vehicles—"wreckers"—Proper license tag for.

Opinion by the Attorney General.

I have your letter of October 26, 1928. In it, you request my opinion:

1. Is a dealer's tag permissible on a "wrecker," which, complete, is usually composed of a truck, upon which is fashioned a hoisting device used for towing disabled motor vehicles to garages for repairs, the truck, being a part of the automobile dealer's stock of vehicles for sale and on demonstration for sale.

2. If not, what kind of tag is required for such an outfit.

In answer to your first question will state that a "demonstration tag," which you term a "dealer's tag," is not the proper tag for use on such a vehicle. Your attention is invited to Section 21 of an Act approved Sept. 13, 1923, (General Acts 1923, p. 120), which deals with demonstration tags, and which provides, in part, as follows:

" * * * Such tag shall not be used on service cars, and such tags shall not be used except for the purpose of demonstrating his own cars for sale."

When a dealer takes a truck which is a part of his stock of vehicles which he has in his shop for sale, and mounts thereon a wrecking device, and then uses that truck as thus made up to tow in disabled motor vehicles, he is not making a bona fide demonstration of the car for sale and is using it as a service car.

In answer to your second question, the license for motor trucks is set forth in Section 17 of an Act approved July 22, 1927, (General Acts 1927, p. 157), and the license tax on motor trucks is based upon two propositions, viz:

First. Manufacturer's tonnage as opposed to the actual transporting capacity of the truck.

Second. Whether or not the excise tax has been paid on motor fuels to be used in the truck.

By "manufacturer's tonnage," I mean to say carrying capacity of the truck as determined by the manufacturer and not as determined by the purchaser. Therefore, if one takes a three-ton truck within the meaning of Section 17 of the last above mentioned Act, and mounts thereon, permanently or temporarily, a wrecking device, hoisting device, or the like, the proper license is that license provided in said Section 17 for a three-ton truck. In this case, however, it is well to call your attention to Section 81 of an Act approved August 23, 1927, (General Acts 1927, p. 379), which makes it unlawful for

one to drive and operate any vehicle over the roads or highways of the State unless the tag license attached to the vehicle is of the proper classification computed upon the basis of the load carried upon the vehicle. This simply means that if one has a truck capable of safely carrying, according to the manufacturer's tonnage rating, one ton and less than two tons, for instance, and carries on the truck a four-ton load, he is guilty of a misdemeanor within the meaning of Section 81 of said Act.

I may state also, in passing, that oftentimes garage men take touring cars, or motor vehicles other than trucks, strip the body therefrom, except the front seat and mount on the rear part of the chassis a wrecking device. In such instance a truck license should be obtained to operate such a reconstructed vehicle and in no event should such truck license be for less tonnage than the load carried—the wrecking or hoisting device being the load or a part of the load.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 30, 1929.

The Judge of Probate,
Montgomery, Montgomery County, Ala.

Dear Sir:

Motor vehicles—county board of education—motor vehicles owned and used by county board of education, other than for transporting children to and from school, require no license but must carry tag, which is to be obtained, without cost, on application by proper official to judge of probate of Montgomery County.

Opinion by the Attorney General.

I have your letter of March 22, 1929. In it you refer to an opinion written by me to the judge of probate of Crenshaw County, Alabama, dated January 7, 1929, and you request that I reconsider this opinion on the ground that, in your opinion, where a motor vehicle is owned and used by a county board of education, or by any municipal corporation, or county in this State, the tag for such vehicle should be procured from the probate judge of the county in which the board, or municipal corporation is located, or from the probate judge of the county owning the vehicle, where it is owned by a county, and you refer to Section 22 of an Act approved Sept. 13, 1923 (General Acts 1923, p. 284). You further state that, according to your construction there is no doubt but that application should be made to the probate judge of Montgomery County for license tags for State owned cars, but you think it unreasonable to suppose that you should be called upon to issue tags for cars owned and used by county boards of education throughout the State, and based upon your theory, you state that you wonder if you would not also be required, if the opinion above cited is correct, to issue tags

without cost when owned by all municipalities within the State or when owned by any county within the State.

I assume from your letter your questions to be:

1. Does the law require that the probate judge of Montgomery County issue license tags for motor vehicles owned and used by each municipality and county within the State?

2. Does the law require that the probate judge of Montgomery County issue license tags for motor vehicles owned and used by county boards of education throughout the State, other than those vehicles exclusively devoted to transporting school children to and from school.

In answer to your first question, I invite your attention again to the opinion rendered by this office to the judge of probate of Crenshaw County, Alabama, under date of January 7, 1929, and to Section 22 of an Act approved Sept. 13, 1923 (General Acts 1923, p. 284). Where a motor vehicle is owned and used by any municipal corporation or county of the State, no license tax is imposed thereon, but the vehicle shall bear a numbered tag, and it is the duty of the judge of probate of the county owning the vehicle, and county in which the municipal corporation is located, to issue said numbered tag, to the proper county or city authority, upon the payment of fifty cents therefor, but, as stated in the opinion cited, a car which is owned and used by a county board of education, is not owned by the county, but is owned and used by the State. In order for the county or any municipality thereof to obtain a tag for fifty cents, the motor vehicle must not only be owned, but must also be used by the county or the municipal corporation concerned.

In answer to your second question, will state that, except for those motor vehicles used exclusively for transporting school children to and from school, which do not carry license tags, it is your duty as judge of probate of Montgomery County to issue tags for all other motor vehicles owned by each and every county board of education within the State, and this is, on the theory that, said vehicles are owned by the State. As held in the opinion above cited: "Motor vehicles owned and used by a county board of education are, in contemplation of law, owned and used by the State."

A county board of education is a separate governmental instrumentality of the State. It is not under the control of the commissioners court. It has its own treasurer. It receives and expends its funds without consulting other county authorities. It is, in every sense, for the purposes here mentioned, an instrumentality of the State, to carry into full effect the functions of the State.

You, of course, understand that there is no exemption from license tax for motor vehicles owned by the officers and employees of a county board of education, even though such vehicles may be devoted to official business.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 30, 1929.

Chief, Division of Weights & Measures,
Agricultural Department,
Montgomery, Alabama.

Dear Sir:

Illuminating oils—regulated by Article 19 of the Agricultural Code, 1927. Liquid Motor fuel—regulated by Article 20 of the Agricultural Code, 1927.

Opinion by Assistant Attorney General Smith.

I have your letter of March 21, 1929, in which you submit the following statement of facts:

"Mr. C. E. Spivey, of the Scottsboro Hosiery Mills, Scottsboro, Alabama, desires to sell a product which he calls "gas-oil" to his tractor trade. He also states that this product is used mostly in oil burners around residences and factories, but also burns successfully in oil lamps and heavy tractors and stationary engines. In case this product comes under the definition of gasoline or other liquid motor fuels, it would be necessary that the State Board of Agriculture adopt standards for tractor fuel as differentiated from automobile fuel, as tractors will burn a much lower grade product than automobiles. In that case tax collected by the state would be one-fortieth of one cent per gallon. On the other hand, if its successful use as a lamp fuel would place it under Article 19 as an illuminating oil, the tax would be one-half cent per gallon."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Whether or not this department should collect under either Article 19 or Article 20 of the Agricultural Code of 1927, and if so, under which Article we should collect the tax?

Under your statement of facts I am of the opinion that if the oil described in the statement of facts is sold in this state for **illuminating purposes** it is regulated and the inspection fee is collected in accordance with Article 19 of the Agricultural Code of 1927.

If the oil is also sold as a **motor fuel** in this State, it must be governed by the regulations as contained in Article 20 of the Agricultural Code of 1927.

It seems clear that in making the regulations as contained in Article 19 and 20 of the Agricultural Code of 1927, the Legislature intended to make different rules for the different purposes that the oil may be used for.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 30, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Chief of Police may receive reward—where offense not committed in his jurisdiction.

Opinion by Assistant Attorney General Haynes.

I have your letter of March 14, 1929, in which you state that the Chief of Police of Cordova, Walker County, Alabama is claiming reward offered by the Governor of Alabama July, 1928, for the arrest and conviction of one Isaac Johnson, charged with murder in Morgan County, Alabama. It appears that Johnson was arrested and turned over to the Sheriff of Morgan County on the 5th day of August, 1928, by the Chief of Police of Cordova, Alabama, and was convicted in the Circuit Court of Morgan County of manslaughter September, 1928, and is now serving his sentence in the State Penitentiary.

You request my opinion:

Is the Chief of Police of Cordova entitled to collect this reward?

It is my opinion he is.

As far as I can ascertain this question has never been passed on by our courts of last resort, and the courts of other jurisdiction have not been uniform in their holdings. In the case of Morrell vs. Quarles, 35 Ala. 544, it is declared to be the public policy of the State that it is unsound to reward a public officer, aside from his regular compensation, for the discharge of an official duty. But as an exception to the general rule of law, in the opinion rendered by the Attorney General of Alabama, Biennial Report 1918-20, p. 518, it is held that a sheriff of one county may receive a reward offered for an offense committed in another county **which is beyond his jurisdiction**, and the Attorney General concluded his opinion with the following:

"Whatever duty rested on a sheriff to detect the law violators who were committing crime within Etowah County rested on the sheriff of Etowah County, and not on the sheriff of Blount County. The failure of the sheriff of Blount County to investigate criminal violations perpetrated in another county could not be charged to him as a neglect of duty."

"It is my opinion that the investigation and detection of criminal violators in Etowah County were services rendered outside of and not inconsistent with the official duties of the sheriff of Blount County, and that no rule of public policy would be violated in allowing him the reward offered by the Governor for the performance of such duties."

Accepting this opinion as sound it brings us to the case under consideration, and I am unable to see any real difference in the facts surrounding

each. It is true the Chief of Police of Cordova is a peace officer, but he is located in a different county from the one where the offense was committed. He is not under any specific official duty to detect law violators who commit crimes in Morgan County no more than the sheriff of one county is under any official duty to detect those who commit crimes in another or adjoining county. The jurisdiction of the chief of police of an incorporated town extends only to the corporate limits and the police jurisdiction of the town. Therefore, it is my opinion the Chief of Police of Cordova, Ala., is entitled to the reward.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Superintendent of Education,
Livingston, Sumter County, Alabama.

April 30, 1929.

Dear Sir:

Schools—funds cannot be used to pay sidewalk assessment against school property.

Opinion by Assistant Attorney General Koonce.

I have your letter of March 16, 1929 in which you state that in the years 1925 and 1926 the Town of York paved the sidewalk on Fourth Avenue. You further state that the property of the Sumter County High School faces on this Avenue and that an assessment was made against the said property.

You request my opinion:

1. Can the town of York make an assessment against State property?
2. Are there any funds of the State available to pay this?
3. Can any part of the matriculation fee be used for this sidewalk?
4. Is there any liability against the County Board of Education for this assessment?
5. Can the County Board of Education now pay this amount when no contract was made by the State for this work to be done?
6. Can the County Board of Education use any part of the three mill tax of the County to pay this indebtedness or can it issue warrants against this fund?
7. Can any part of the district three mill tax be used for the purpose of paying this?

In my opinion the seven questions propounded by you must be answered in the negative.

School funds cannot be used to pay the expenses which you mention, because such is expressly prohibited by Section 91 of the Constitution of

Alabama of 1901. I rendered an opinion on February 21, 1929 to the superintendent of education of Morgan County in which I held that the county board of education cannot pay for curb and gutter in front of high school property. I am enclosing copy of such opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 30, 1929.

Mr. William Luther Phelps,
Chairman, Board of Education,
Greenville, Butler County, Ala.

Dear Sir:

County Board of Education—alteration of terms of contract for erection of school building.

Opinion by Assistant Attorney General Koonce.

I have your letter of April 8, 1929, in which you state that in 1928 the County Board of Education entered into a contract with Dolph Owens for the erection of a school building at McZenzie. You further state that when Mr. Owens began work on the building he discovered that on account of the slope of the land on which the building was to be erected, a great deal more brick work would be required for the foundation than he had anticipated at the time of the execution of the contract. You also state that Mr. Owens took the matter up with the County Superintendent of Education and was assured that he would be paid for such extra brick work.

You request my opinion:

Can the above expense for additional brick work be paid?

In my opinion the above expense cannot be paid.

When Mr. Owens bid on the school building he did so in competition with other contractors, and the contract was awarded to him because his bid was lower than theirs. After the contract was executed there was no consideration for a promise to pay him an additional amount for brick work.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

The Judge of Probate,
Troy, Pike County, Alabama.

April 30, 1929.

Dear Sir:

Witness Fees: Claim for State witness fees barred unless presented for allowance within twelve months.

Opinion by Special Assistant Attorney General Cobb.

Your letter of April 10, 1929, addressed to Hon. Chas. E. McCall, Chief Examiner of Accounts, has been referred to me with the request that I give you an official opinion.

You state, among other things, that a citizen served as a witness in one of the cases against F. P. Folmar in 1925 and again in 1927, and that this case was disposed of in 1927, and, as I understand your letter, the state failed to get a conviction, and that the said witness failed to present his claim and have the same recorded as provided by law.

You direct my attention to Section 4 of Local Act No. 345, approved September 17, 1919, (Local Acts 1919, p. 141). You further state that the former clerk of the Circuit Court is willing to make an affidavit that he informed said witness erroneously concerning his witness certificate.

You request my opinion:

Would it be permissible to attach the former clerk's affidavit to this script and issue a warrant in favor of the holder?

The reply to your inquiry is in the negative. There is no authority of law for such action. The warrant, if issued would be void, and the payment of the warrant would be illegal. The law must be strictly complied with to justify you in issuing all warrants, and the County Treasurer, or custodian of the County funds, in paying the same.

It appears from the provisions of Act 345, *supra*, that witnesses before grand juries and State witnesses are paid from the general fund of the County in all criminal cases in which the State fails to convict. Section 228, Code of Alabama, 1923, reads as follows:

"228. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

I am, therefore, of the opinion that the witness should have presented his claim for allowance within twelve months else the same is barred, and the Court of County Commissioners could not register the claim as provided for in Section 4 of Act 345, *supra*.

The fact that the Clerk of the Circuit Court gave the witness erroneous advice has nothing whatever to do with the matter. I, therefore, advise you that you cannot legally issue a warrant to the holder of this certificate.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 1, 1929.

Hon. L. H. Brassell,
Associate Commissioner,
State Tax Commission,
CAPITOL.

Dear Sir:

Chauffeur's license—No provision of law for payment of license for one-half year.

Opinion by the Attorney General.

I have your letter of April 11, 1929. In it you invite attention to Section 377 of the Revenue Act of 1919, also Sections 20 and 25 of the Motor Vehicle Act of 1923. You request my opinion:

Is it legal to issue a license for a chauffeur for a half year under the provisions of Section 377 of the Revenue Act of 1919?

In my opinion, it is not. Section 377 of said Act has no application. There is no provision of law for issuing a license for a half year to a chauffeur.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 2, 1929.

Justice of the Peace,
Precinct 14, Route B,
Opp, Covington County, Alabama.

Dear Sir:

Jurisdiction: Justice of the Peace has no final jurisdiction over prosecutions for uttering fraudulent checks.

Opinion by Assistant Attorney General Cobb.

I have your letter of April 26, 1929, in which you state that you are Justice of the Peace for Precinct 14, Covington County, Alabama.

You request my opinion:

Has a Justice of the Peace final jurisdiction in prosecutions for making or uttering fraudulent checks?

In reply to your inquiry, it is my opinion that a Justice of the Peace does not have final jurisdiction in such cases.

The law in regard to making and uttering fraudulent checks is found in Sections 4158 and 4159 of the Code of Alabama, 1923, as amended by Act approved August 20, 1927, (Acts 1927, p. 286). The fine when a defendant is convicted under either section as amended is not more than one thousand

dollars, and he may also be sentenced to hard labor for the county for not longer than six months.

Nothing is said in either one of the above cited Sections of the Code as amended as to conferring jurisdiction of these offenses upon Justices of the Peace. Sections 3847 and 3848, Code of Alabama, 1923 contain all general authority I am able to find as to final jurisdiction of Justices of the Peace in criminal cases. Therefore, you as Justice of the Peace have only preliminary jurisdiction of offenses provided for in Section 4158 and 4159, supra.

Opinion Attorney General to Justice of the Peace, Daleville, Ala.,
Aug. 1, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 2, 1929.

The Tax Assessor,
Brewton, Escambia County, Alabama.

Dear Sir:

Taxation: Motor vehicle ad valorem tax and license tax must be assessed and paid in the County where owner resides. Section 18, Subsections (f) and (e) of an Act approved July 22, 1927, construed.

Opinion by Assistant Attorney General Cobb.

I have your letter of April 9, 1929, enclosing copy of a previous letter in which you direct my attention specifically to Section 18, subsections (f) and (e) of an Act approved July 22, 1927, (Acts 1927, p. 159), imposing the duty of assessing and collecting ad valorem city tax on motor vehicles upon the tax assessors and collectors of the several counties in addition to the duty of assessing and collecting ad valorem taxes due the State and Counties, and providing for the date said motor vehicles shall be subject to taxation.

You enclose a specimen of motor vehicle ad valorem assessment and ad valorem tax receipt which shows that a resident of Brewton, Alabama, assessed and paid his ad valorem taxes in Brewton on an automobile, and that this automobile was purchased on the 15th day of September 1928, from Hobbie Motor Co., Montgomery, Alabama. You state that this automobile has been in the City of Montgomery for the past twelve months, and that you have been assessing city tax on all automobiles owned by residents of Brewton at the time of securing new tags without any consideration of the date they are brought into the city.

You request my opinion:

1. Should the State, County and City taxes on this automobile be paid in Brewton, Alabama?

2. Do the words in Subsection (e) supra, "before the tax assessor has completed his assessment," mean the completion of your regular assessment on the 4th Monday in March, or do these words refer to completion of auto assessment on September 30th?

Answering your first inquiry, I am of the opinion that the ad valorem tax on a motor vehicle must be assessed and paid, and the license taken out in the city and county where the owner resides, regardless of where the motor vehicle has been used in the past, and regardless of the date it is actually brought into the City of Brewton.

It is apparent that the legislative intent was that the ad valorem tax should never be assessable and payable until a license tax is applied for to operate a motor vehicle. The law prohibits the payment of an ad valorem tax on a motor vehicle in one city or county, and the license tax to operate it in another city or county. Therefore, an individual who is a resident of Brewton should assess and pay the ad valorem tax on a motor vehicle, and take out his license to operate the same in Brewton. An individual who is a resident of Brewton could not legally assess his automobile and take out his license in any other city and county than the one of his residence.

Answering your second inquiry requesting my construction of Subsection (e) supra, it is my opinion that the words "before the tax assessor has completed his assessment" refer to the last Monday in March, and do not refer to September 30th.

See opinion of Attorney General to License Inspector, Montgomery County, January 21, 1929, Book 9, p. 137 (Office Edition).

Biennial Report of Attorney General, 1924-26, p. 35.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 2, 1929.

Judge of Probate,
Troy, Pike County, Alabama.

Dear Sir:

Daily balances: Interest on daily balances of different special funds should be applied to the particular fund on which the interest accrued.

Constitutional debt limit: Warrants issued for unauthorized debts incurred, after the constitutional debt of a county has been reached, are void.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of recent date.

You state that the former treasurer of your county will in a short time pay to the county a certain sum of money which represents the interest accrued on daily balances of various special funds of the county.

You also state that certain machinery concerns hold warrants of the county which were issued at a time when the county was in excess of its constitutional and authorized debt limit. I must assume for the purpose of your inquiry that the debt for which the warrant was issued was incurred subsequent to your county reaching its constitutional debt limit and after the authorized amount of the expected current revenue for the year had been pledged.

You inquire first, as to what fund the accrued interest on daily balances of special funds should be applied.

You inquire, secondly, whether or not the warrants which were issued under the circumstances set out above, as I conceive the import of your statement of facts, can be legally paid or refunded.

I am of the opinion that interest accrued on daily balances of special funds should be applied to the particular fund upon which the interest accrued.

Where certain funds are set aside by the Legislature for a particular use the same become special funds to be devoted to the use specified. Quite naturally when a fund augments itself, by earning interest then that fund should reap the benefit.

I am further of the opinion that a debt contracted or incurred after the county had arrived at its constitutional debt limit, specified by Section 224 of the Constitution and has also reached the debt limit authorized by a pledge of one-half of its anticipated revenue for the current year for necessities, debts incurred are void contracts or no contracts at all, and that the warrants issued to pay the same are void and further that any contract to refund such warrants or supposed indebtedness by issuing interest bearing warrants would be void.

It must be borne in mind that where a county with the aid of an individual or corporation ignores the Constitution, that no contract capable of enforcement is consummated. If the original contract is void it will support no ratification and any attempt to give such contract life is a nullity.

Sections 215 & 224, Constitution, 1901.

Hagan vs. Limestone Co., 160 Ala. 544.

Code of Alabama, Section 6777, Code of 1923.

Brown vs. Gay-Padgett Hdw., 188 Ala. 423, 427.

Potts vs. Conecuh Co., 203 Ala. 300.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 2, 1929.

The State Auditor,
State Capitol,
Montgomery, Alabama.

Dear Sir:

Auditor, State—Employment of statutory office personnel.

Acts—Sections 4 and 25 of an Act approved Sept. 7, 1927, (General Acts, 1927, p. 681), construed.

Opinion by the Attorney General.

I have your letter of May 1, 1929. In it you invite my attention to Sections 4 and 25 of an Act approved Sept. 7, 1927, (General Acts, 1927, p. 681), and you request my opinion:

Must I, as State Auditor, in employing all the persons whose salaries are fixed by Section 4 of the Act above cited, first obtain the approval of the State Board of Administration and the Governor, as required for employment of persons under Section 25 of said Act?

I am of the opinion that Section 25 of the Act approved September 7, 1927, *supra*, is not applicable in the employment of persons whose compensation is fixed in subsections 2—13 inclusive, of Section 4 of said Act, and, that, therefore, in employing persons to occupy the places mentioned in said Section 4 of said Act, you are not required first, to obtain the approval of the Governor and the State Board of Administration to do so. Section 25 of the Act approved Sept. 7, 1927, *supra*, insofar as it has application to the employment of persons in the office of the State Auditor, applies only where you, as State Auditor, seek to employ additional clerical assistance over and above that prescribed by Section 4 of said Act. A further construction of said Section 25 seems immaterial to a proper answer to your inquiry.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 2, 1929.

Judge of Probate,
Prattville, Autauga County, Alabama.

Dear Sir:

Where mortgage has been recorded and filing tax paid as provided by Section 4½, Revenue Act, 1923, and subsequently the time of payment of debt secured is extended by written contract, a filing tax must be paid on filing such contract for record.

Opinion by Assistant Attorney General Evans.

Your letter of March 18, 1929, is acknowledged. You wish to know if, when a mortgage has been recorded and the filing tax paid thereon and the time for payment of the debt secured by such mortgage is subsequently extended by written contract and such contract is offered for record, is there due any tax for filing such contract for record.

In reply will say that by provisions of subdivision (f) of Section 4½ of the Revenue Act, 1923, (Acts 1923, p. 158) such tax is clearly required. This subdivision, so far as necessary for answer to your question reads as follows:

"When the time of payment of the indebtedness secured by any such mortgage, * * *, is extended or renewed, and the extended or renewal contract is offered for record the tax required by this section shall be paid on the amount of indebtedness so extended or renewed."

The words "such mortgage" refers to a mortgage which has been recorded and the filing tax paid thereon. The words, "the tax required by this section" has reference to the amount of tax required for filing an original mortgage for record—fifteen cents on each one hundred dollars, or fractional part thereof, of the debt secured—when extended by written contract, of the debt extended.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 2, 1929.

The Circuit Solicitor,
8th Judicial Circuit,
Cullman County, Alabama.

Dear Sir:

Office Quarters—Circuit Solicitor not legally entitled to office space at Court House in any County in Circuit.

Office Supplies—County Officers—Commissioners' Court cannot legally expend county funds for stenographic help, stationery, stamps, janitor hire, etc. for Circuit Solicitor.

Court of County Commissioners—Under no legal obligation to furnish Circuit Solicitor with office.

Court of County Commissioners—Cannot legally expend funds for office supplies for Circuit Solicitor.

Opinion by the Attorney General.

I have your letter of April 27, 1929. In it you invite attention to Section 196, subsection 3 of Section 5498, and subsection 1 of Section 6755, Code of Alabama, 1923, and as Circuit Solicitor of the Eighth Judicial Circuit of Alabama, under authority of Section 860, Code of Alabama, 1923, you request my opinion:

1. Is it not the duty of the Court of County Commissioners or other like court or Board in the County wherein the circuit solicitor resides to furnish such circuit solicitor an adequate office in the courthouse of the county of his residence by order of such court entered upon the minutes of the court at a regular term of such court; or, in the event the courthouse is inadequate to supply such adequate office, for such Commissioners Court or Board to lease such adequate office rooms in a convenient location in the county site for such circuit solicitor and to pay the rental therefor from the county funds of the residence of such circuit solicitor?

2. Would it not also be the duty of such Court of County Commissioners or other like Court or Board, in view of the provisions of such law, to also pay from the county fund of the residence of such circuit solicitor the other office expenses, including stenographic help, stationery, stamps, janitor hire, etc., expended by him in the discharge of his duties under the provisions of law for such county of his residence?

In answer to your first question will state that the Court of County Commissioners of any County in the circuit is under no legal obligation to furnish you with an office in or at the courthouse, nor can it legally expend county funds in payment for office rent for such office.

Opinion Attorney General to Probate Judge Elmore County, Jan. 21, 1927.

In answer to your second question will state that the Court of County Commissioners of any county in your circuit cannot legally expend county funds in payment for stenographic help, stationery, stamps or janitor hire for the circuit solicitor. Nowhere in the Code or the statutes of the State is it provided that the circuit solicitor is entitled to rooms in or at the courthouse of any county in any circuit, under the general law.

Subsection 3 of Section 5498 of the Code, supra, is not material to your inquiry, neither is Section 196 of said Code. Nowhere under the general law is it provided that the Circuit Solicitor shall be furnished the items mentioned in your second inquiry.

Of course, if the Court of County Commissioners of its own volition furnishes you with office space at the courthouse, such action is not contrary to law, but said Court could not legally expend funds for the item mentioned in your second inquiry, nor could it expend funds for the purpose of renting an office for you.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 3, 1930.

The State Auditor,
CAPITOL.

Dear Sir:

Janitors for Capitol Building—Governor may designate janitors for offices of State Departments.

Opinion by Assistant Attorney General Knight.

This is to acknowledge the receipt of your letter of recent date.

You state that certain convicts are used as janitors for the various offices of the State Capitol.

You inquire whether or not the various Departments should pay to the State Board of Administration hire for such convicts while they perform the services as janitors for such Departments?

In my opinion, no Department using "trusties," that is, convicts who have been designated by the Governor to work in and about the Capitol, as janitors or servants, is required to pay any sum to the Convict Department as hire for such services of convicts.

The various departments of the State are without authority to employ janitors except where it is **necessary to employ** a janitor.

The Governor may designate convicts to act as janitors or to work about the Capitol offices and grounds.

Section 3591, Code of Alabama, 1923.

Where the Governor has designated a convict to serve as janitor for a Department, the necessity of employing one has been obviated. There is no provision of law that a Department may reimburse the Convict Department for the services of a convict who has been designated by proper authority to serve as janitor for such Department.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 3, 1929.

The Clerk of the Circuit Court,
Greenville, Butler County, Alabama.

Dear Sir:

Code—Section 8587 construed.

Officers—Clerk of the Circuit Court may be Clerk of the Jury Commission in certain counties under Section 8587, Code of Alabama, 1923.

Jury Commission—Clerk to.

Opinion by the Attorney General.

I have your letter of April 20, 1929. In it you state that you have been asked to accept the position of Clerk to the Jury Commission of Butler County, Alabama.

You request my opinion:

Under Section 8587, Code of Alabama, 1923, may you, as Circuit Clerk of Butler County, Alabama, be employed as Clerk to the Butler County Jury Commission?

I am of the opinion that if Butler County, Alabama, has seventy-five thousand or less population by the last Federal census, you may be employed as Clerk to the Jury Commission of such County, and in such capacity, your services being ex officio, you may receive the compensation provided by said Section of said Code.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 3, 1929.

The State Tax Commission,
CAPITOL.

Gentlemen:

State Tax Commission—Power to require monthly reports from automobile dealers.

Opinion by Assistant Attorney General Haynes.

I have your letter of April 1, 1929, in which you state that quite a number of automobiles are escaping ad valorem taxation and tag licenses through transfers not made in accordance with law. That a large part of these escapes could be detected if you could secure from automobile dealers of this State a statement each month of all sales of new and second-hand cars.

You request my opinion:

Please advise us if we have authority to require such a statement from automobile dealers of this State.

I am unable to find any law or statute that requires automobile dealers in Alabama to make monthly reports to your Commission of sales made by them during the preceding month of new and second-hand automobiles, trucks, etc. However, under paragraph six of Section 67 of an Act of the Legislature 1923, page 187, the Tax Commission may examine at all reasonable business hours, as a body, separately or by agent, any books, documents, records or papers kept by any person, firm or corporation. Under the above provision it seems to me that the Tax Commission could obtain the necessary information in the manner set forth therein.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 3, 1929.

The County Superintendent of Education,
Birmingham, Jefferson County, Alabama.

Dear Sir:

Flowers—State wild flower law—what protected by—extent of operation.

Acts—Act approved August 25, 1927 (General Acts, 1927, p. 333), construed.

Opinion by the Attorney General.

I have your letter of April 4, 1929. In it you state that you are undertaking to teach the school children of your county to respect the State wild flower law. You enclose a copy of said Act. You infer that some of the school children in your county have been gathering such flowers as violets, and what are commonly known as "sweet williams," etc., which grow promiscuously over the woods and fields.

You request my opinion:

Are such flowers and plants as grow out of the ground, but are not upon trees, bushes, shrubs, etc., such as violets, "sweet williams", and other like plants included in the list protected by law.

One of the main objects of the Act, *supra*, is set forth in the title, the pertinent part of which is as follows:

"To conserve all flowering trees, bushes, shrubs, and plants, domesticated, native or wild in all counties in the State of Alabama, which now have, or may hereafter have over one hundred thousand population according to the last Federal census, or according to any Federal or State census hereafter taken, * * *."

The Act has application only in those counties of over one hundred thousand population, determined as set forth.

The Act has application only to those trees, bushes, shrubs, and plants which flower. But, in my opinion, the Act does not protect those flowering trees, bushes, shrubs and plants which are poisonous to contact therewith, as such are a nuisance.

A violet is a "plant". See Webster's International Dictionary. A "sweet william" is likewise a plant.

The Act has no application to flowering trees, bushes, shrubs and plants cut, broken, removed or injured by the owner on one's own land or by the persons in possession of such land, nor has it application to such persons transporting the same therefrom. The first Section of said Act has no application where these trees, bushes, etc., are disposed of as above set forth with the consent of the owner or persons in possession of the land on which they grow. The same reasoning applies to Sections 2, 3 and 4 of said Act.

For the reasons above set forth I am of the opinion that violets and "sweet williams" and other flowering plants are protected by said law in the counties in which the law has application.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 4, 1929.

The Judge of Probate,
Cullman, Cullman County, Ala.

Dear Sir:

Offices—court of county commissioners under no legal duty to furnish office space in courthouse to county or deputy solicitors.

Opinion by the Attorney General.

I have your letter of April 27, 1929. In it you invite attention to subsection 1 of Section 6755, Code of Alabama, 1923, as amended by an Act approved February 18, 1927 (General Acts, 1927, p. 57), also to subsections 3 and 8 of Section 5498, Code of Alabama, 1923, and you request my opinion:

1. Is it the duty of the court of county commissioners or other like court or board in the county wherein a deputy or county solicitor resides to furnish such county or deputy solicitor an adequate office in the courthouse of the county of his residence by order of such court entered upon the minutes of the court at a regular term of such court; or, in the event the courthouse is inadequate to supply such adequate office, for such commissioners' court or board to lease such adequate office rooms in a convenient location in the county site for such deputy or county solicitor and to pay the rental therefor from the county funds of the residence of such deputy or county solicitor?

2. Would it also be the duty of such court of county commissioners or other like court or board, in view of the provisions of such law, to also pay from the county fund of the residence of such deputy or county solicitor the other office expenses, including stenographic help, stationery, stamps, janitor hire, etc., expended by him in the discharge of his duties under the provisions of law for such county of his residence.

In answer to your first question, will state that there is no statute applying generally throughout the State, providing that the court of county commissioners shall furnish a deputy or county solicitor with an office in the courthouse of the county of his residence, or furnish him office space elsewhere.

In answer to your second question, will state that there is no law applying generally throughout the State authorizing the court of county commissioners to furnish a deputy or county solicitor with office expenses, such as stenographic help, stationery, stamps, janitor hire, etc., expended by him in the discharge of his duties.

If the court of county commissioners desires to furnish a deputy or county solicitor with office space in the courthouse, I know of no legal objection to its doing so, but it cannot expend public funds for such purposes. Many of the counties of the state allow these officers to have offices in the courthouse, but this allowance is without expense to the county.

I hand you herewith a copy of an opinion written to the circuit solicitor of the 8th Judicial Circuit at Cullman, Cullman County, Alabama, which also answers these same questions in their application to the circuit solicitor. I notice that you do not refer in your letter to the circuit solicitor, but, as stated in the attached opinion, my answers are practically the same as stated in this opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 4, 1929.

The President,
Jefferson County Jury Commission,
Room 112 Courthouse,
Birmingham, Jefferson County, Alabama.

Dear Sir:

Jury Commission—Duties of.

Opinion by the Attorney General.

I have your letter of April 15, 1929. In it you request that I outline to you the duties of a jury commission. You call attention to the fact that only approximately 9,000 veniremen are used annually in your county, and, presumably, you infer that there is a very large number of male citizens in Jefferson County who, in every way, in the judgment of the Jury Commission, can meet the legal qualifications to go on the jury rolls and in the jury boxes. From your letter I judge your questions to be:

1. What are the duties of the Jefferson County Jury Commission?
2. If the Jury Commission finds there are between thirty and forty thousand persons in every way eligible to have their names upon the jury rolls and in the jury boxes, it is the duty of the jury commission to see that this is done, in the light of the fact that only approximately 9,000 veniremen are used annually by the courts of Jefferson County?

In answer to your first question, your Commissioners should (1) take the oath of office under Section 279 of the Constitution, (2) be commissioned by the Governor, (3) elect a president, (4) appoint clerks to the Jury Commission, (5) see that the clerks take the oath of office prescribed in Section 279 of the Constitution, (6) see that the clerks obtain the name of the male citizens of Jefferson County as provided by Section 8591 of the Code, (7) see that the clerks perform all other ministerial duties properly under your direc-

tion, (8) meet in the courthouse at the county seat on the first Monday in October in each year or as soon thereafter as practicable, if necessary, to accomplish the duties outlined in Section 8600 of the Code, (9) cause the clerks to prepare the jury cards as required by Section 8601 of the Code, (10) in Jefferson County, prepare the jury rolls and jury boxes in accord with Section 8633 of the Code, (11) put on the jury rolls and in the jury boxes the names of all male citizens who, in the Commission's judgment, meet the qualifications prescribed by Section 8603 of the Code, as contemplated by Section 8606, (12) see that the clerks to the Jury Commission perform the duties required by Section 8607 of the Code, (13) whenever the names in either jury box are exhausted or so far depleted that they will probably be exhausted at the next meeting of jurors, meet and perform the duties required by Section 8604 of the Code, (14) the clerks to the Jury Commission, under the Commission's direction, should perform the duties mentioned in Section 8625 of the Code.

These are the main matters with which you are concerned. Possibly there are others, but by a careful perusal of the Code of Alabama, you may be able to clear up any other points.

In answer to your second question will state that if the Jury Commission of Jefferson County finds there are thirty thousand male citizens who, in the judgment of the Jury Commission, meet the statutory qualifications to have their names placed on the jury rolls and in the jury boxes, then, it is immaterial that the courts of the county need only 9,000 veniremen per year. Your Commission should place upon the jury rolls and in the jury boxes all persons who, in the Commission's judgment, meet the legal qualifications for jurors. The fact that at the end of the year there may be a large number of names of persons still in the jury boxes, is immaterial. That section of the Code which requires that you meet annually in the month of October to make new jury rolls and to refill the jury boxes, contemplates that, though you may meet, you are under no legal duty, and you are without authority of law to empty the jury boxes where the boxes are not exhausted or so far depleted, that they will probably be exhausted at the next drawing of jurors.

In other words, if the Jury Commission of Jefferson County puts thirty thousand names in a jury box and the year passes by and at the end of the year they find that there are twenty thousand names remaining in the box, clearly the Jury Commission cannot legally empty the box, and refill it. Again, if the Jury Commission finds that there are thirty thousand persons in Jefferson County eligible for jury service, meeting all the statutory qualifications, the Jury Commission transcends its authority if it merely puts a fractional part of this number on the rolls and in the boxes.

To summarize, it is not the duty of the Jury Commission to limit the jury roll and jury boxes to that number of veniremen used by the courts, if the Jury Commission finds that there are more persons qualified for jury duty. Expediency cannot justify a violation of the plain mandate of the law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1929.

Tax Collector,
Jasper, Walker County, Alabama.

Dear Sir:

Tax Sale—Notice of such sale must be by personal service when resident; when non-resident by publication.

Opinion by Assistant Attorney General Haynes.

I have your telegram of May 2, 1929, in which you state the following:

"Is it legal to serve notice on delinquent tax payers for decree of sale by registered mail with return receipt demanded?"

It is my opinion that such service by registered mail demanding registered receipt is not sufficient. Section 243 of an Act approved September 15, 1919, (General Acts 1919, p. 353), provides, among other things:

" * * * * such notice must be served by the tax collector, or his deputy, by handing a copy thereof to the party to whom it is addressed, or his agent, or by leaving a copy thereof at the residence or place of business of such party, or his agent; and with his endorsement thereon, showing how and when served, showing his reason for not serving the same, * * * * ".

It is my opinion that the service must be a personal service as designated by the foregoing paragraph.

Of course, if the party on whom service is desired is a non-resident, then notice must be given by publication as provided by statute.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1929.

The State Tax Commission,
CAPITOL.

Gentlemen:

License—baseball park—Schedule 12 of Section 361 of an Act approved September 15, 1919 (General Acts, 1919, p. 402) construed.

Opinion by the Attorney General.

I have your letter of April 20, 1929. In it you state that a cotton mill, in conformity to its custom of providing recreation and places of amusement for its mill hands, built a fence around some vacant property belonging to the mill, for the use of its employees. A public school situated near the mill lacks playgrounds and the pupils are permitted by the mill to make use of this property which is a so-called baseball park. The mill has an amateur

baseball team, as many mills in this State do, and, when these mill games are played, admission is charged. The admission is not for the purpose of profit and is not sufficient to meet the expense of the maintenance of the team for uniforms, baseballs, bats, traveling expenses of visiting teams, etc. The sum received from admissions is therefore supplemented by subscriptions.

Upon this statement of facts you request my opinion:

Is the owner or lessee of the above mentioned property liable for a license for a baseball park, within the meaning of Schedule 12 of Section 361 of the Act approved September 15, 1919?

I am of the opinion that this is a baseball park and that the owner or lessee thereof liable for a license within said Schedule.

The only provision in said Schedule exempting the owner or lessee of a baseball park from privilege license where admission fees are charged is that provision which reads as follows:

"Provided that this schedule shall not apply to baseball parks owned or maintained in good faith by educational institutions located in this State; * * *"

In the instant case the park is neither owned nor maintained by any educational institution located in this State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 7, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
Capitol.

Official Bond. Sheriff liable on his official bond for collecting illegal claim against county.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of April 29, 1929, in which you call my attention to opinion rendered you on April 19, 1929, relative to the number of bailiffs allowed in Circuit Court, and with particular regard to question number three, and my answer to the same. Said question number three reads as follows:

"3rd. The Sheriff of Lauderdale County being on fees, and having no salary compensation, was it not his duty under Subdivision 1 of Section 10189 of the Code of Alabama, 1923, to furnish a sufficient number of deputies to execute the processes and orders of the Court, without the same being paid for by the County, besides the four bailiffs, and the one additional bailiff who waits on the Grand Jury?"

My answer to said question number three reads as follows:

"The answer to your third inquiry is in the affirmative. Under Sections 10188 and 10189, Code of Alabama, 1923, it was the duty of the Sheriff of Lauderdale County to furnish a sufficient number of bailiffs, or deputies, to execute the processes and orders of the Court, since the Sheriff of Lauderdale County is on a fee basis. As stated hereinabove, he takes his office cum onere, and must employ at his own expense the number of bailiffs and deputies in excess of five that may be necessary."

Opinion Attorney General to Chief Examiner, April 19, 1929, Book 10, p. 202 (Office Edition).

You submit the following propositions, and request my opinion:

1. The Sheriff being on a fee basis and taking his office cum onere, and being required to employ at his own expense the number of bailiffs and deputies in excess of five as may be necessary, would not the Sheriff who makes affidavit to the claim filed with the County, and who files the claim with the Court of County Commissioners for additional bailiffs over and above the five bailiffs allowed by law, be liable on his official bond for erroneously claiming from the County payment for the services of such extra persons, as it was his duty to furnish to wait upon the Court?

2. Is the Sheriff liable on his official bond when he makes a wrongful claim and receives the money from the County Treasury for compensation for man employed by him, where there was no duty of the County to pay for such employment?

Referring to your first proposition, I have heretofore ruled in an opinion rendered April 19, 1929, *supra*, that the Sheriff of Lauderdale County takes his office cum onere, and must employ at his own expense the number of bailiffs and deputies in excess of five that may be necessary.

Birmingham Dry Goods Co., v. Bledsoe, 117 Ala. 495.

It is held in the case of *Hawkins ex rel F. D. O'Brien v. The State* (124 Ala. 102), that the Sheriff when he accepts his office takes it cum onere, and must perform its duties whether there is compensation attached to their discharge or not, and this case further holds that when any public officer demands a fee for services rendered by him, he must point to some clear and definite provision of the statute, which authorizes him to make the charge and demand, and that statutes giving costs and fees must be strictly construed and do not extend beyond their letter.

Troup v. Morgan County, 109 Ala. 162.

Torbert v. Hale County, 131 Ala. 144.

Therefore, the Sheriff of Lauderdale County in the instant case is claiming and collecting illegal costs and is liable on his official bond for doing so.

Referring to your second proposition, the answer is in the affirmative, and is covered in the answer to the proposition. The Sheriff in this instance is liable on his official bond, there being no clear and definite provision of law authorizing him to claim and collect such costs.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 7, 1929.

The State Tax Commission,
State Capitol,
Montgomery, Alabama.

Automobile accessories—Schedule 13 of Section 361 of an Act approved Sept. 15, 1919, (General Acts, 1919, p. 402) construed.

Opinion by the Attorney General.

Gentlemen:

I have your letter of April 11, 1929. In it you state that there is a wholesale dealer in automobile accessories having an established place of business at Birmingham, Alabama, who paid a license for said business under Schedule 13 of Section 361 of the Act, *supra*; that this concern has been **sending out traveling salesmen**, who take orders from retail dealers in automobile accessories, and that said orders are filled by shipment from the Birmingham place of business; that the firm wishes to send out trucks carrying a stock of accessories, in order that, instead of shipping from Birmingham on orders, they may make deliveries from the trucks immediately that the order is taken. In other words, you state that this concern will continue to sell to retail dealers in accessories but will deliver articles bought at the time of purchase and that the firm will not have any established place of business except in Birmingham, as stated above. You invite attention to said Schedule 13 of said Act and request my opinion:

Under Schedule 13 of Section 361 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 402), where a wholesale dealer in automobile accessories who has an established place of business in Birmingham, Alabama, has taken out a license for that one established place of business, should said dealer be required to take out a license in each of the different cities and towns in which, from trucks, he makes sales and deliveries?

In answer to your question will state that, in my opinion, the dealer's license taken out by said dealer in the City of Birmingham does not permit said dealer to send his trucks to various other towns and cities in the State, and there, from those trucks, sell and deliver automobile accessories.

Your attention is invited to Section 361 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 395), the pertinent part of which reads as follows:

"That every person, firm, company, corporation, or association engaged in any business, vocation, occupation, calling or profession herein-after enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act."

Schedule 13 of said Section 361 reads as follows:

"Schedule 13. AUTOMOBILE ACCESSORIES.—Each dealer in automobile accessories, including automobile tires: In cities and towns of one hundred thousand inhabitants and more, sixty dollars; in cities and towns of less than one hundred thousand and not less than thirty-five thousand inhabitants, forty dollars; in cities and towns of less than thirty-five thousand inhabitants and not less than seven thousand inhabitants, twenty-five dollars; in all other places, ten dollars."

(General Acts 1919, p. 402).

Also your attention is invited to Section 362 of said Act which reads as follows:

"There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

(General Acts 1919, p. 440).

Your particular attention is called to Section 363 of the Act of 1919, *supra*, (General Acts 1919, p. 440-441), and particularly to that portion of said Section in which it is said that where a license to do a particular business at a particular place is granted, that license shall not entitle the holder thereof to carry on any other business or do any other act than that named therein, "nor at any other location than that therein specified."

In my judgment, it was never contemplated by the Legislature that one could circumvent the Revenue Laws of the State by establishing a place of business and procuring a dealer's license to do that business in that particular locality and then to do his main business in other cities and towns of the State in competition with dealers in similar commodities in those other cities and towns.

A dealer under Schedule 13, is one who has an established place of business, and in order to obtain a dealer's license under Schedule 13, *supra*, there must be a full compliance with Section 363 of the Act of 1919, *supra*. A dealer's license does not permit one to peddle merchandise. A peddler is one who goes from place to place seeking and making sales.

21 R. C. L. p. 183,

Randolph v. Yellowstone Kit, 83 Ala. 472.

A corporation cannot be a peddler.

Where a corporation desires to peddle its goods, it must take out a license in the name of each driver of the wagon or truck.

Opinions Attorney General 1918-1920, p. 645.

Where a specific license is required to do a specific thing or to do a specific thing in a particular manner, then the license must be obtained under the specific schedule in order to do the things mentioned in that schedule in the way therein mentioned, and a peddler's license is not applicable under such circumstances.

The opinion of my predecessor (Opinion Attorney General 1922-1924, p. 168-170) is hereby amplified to this extent.

If the Birmingham dealer desires to have his trucks carry his merchandise to the various towns and cities other than Birmingham, and there sell and deliver that merchandise from the trucks, then a peddler's license must be taken out for the operator of each and every truck.

Opinion Attorney General 1918-1920, p. 645.

See also Schedule 80 of Section 361 of an Act approved Sept. 15, 1919 (General Acts 1919, p. 425).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Note: Amplified by opinion of May 30, 1929, to chairman, state tax commission.

May 7, 1929.

State Tax Commission,
CAPITOL.

Dear Sir:

License—automobile—who may transfer license.

Opinion by the Attorney General.

I have your letter of April 29, 1929, in which you invite attention to Section 12 of an Act approved September 13, 1923 (General Acts, 1923, pp. 285-286) dealing with the license tax chargeable on automobiles and motor cars kept for private use. You state that the question has arisen whether the person paying the automobile license must himself make the application to the Probate Judge to transfer the license or whether the person buying the automobile tag can authorize some one else to go to the Probate Judge and have the transfer made.

You request my opinion:

What is the proper construction of that part of said Section 12 of said Act as to who may transfer an automobile license such as mentioned in said Section 12?

In my opinion a license originally procured under said Section 12 of said Act may be transferred to any other person or to any other car, provided the same is not of a greater horse power, if the application for the transfer is made by the person who originally procured said license. It may not be transferred otherwise. In other words, the person who originally procured the license cannot authorize some one else to effect the transfer. Your attention is particularly called to those words of said Section 12 which read as follows:

"Persons paying an automobile license * * * ."

Clearly this expression refers to the person who originally obtained the license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 7, 1929.

Judge of Probate,
LaFayette, Chambers County, Ala.

Group Insurance—Commissioner's Court without authority to make appropriation for the payment of premium.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 10, 1929, in which you state that Chambers County is desirous of obtaining group insurance for the various county employees.

You request my opinion:

Has the Court of County Commissioners of this County the authority to make an appropriation to pay part of this premium?

It is my opinion it cannot. There is no authority of law for such an appropriation. Before the Commissioner's Court can expend or appropriate any money for any cause it must be able to point to some direct statute authorizing the same. The Court and its powers are purely of statutory origin. It has no inherent or constitutional powers.

State vs. Street et al, 117 Ala. 203.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1929.

The Board of Revenue,
Columbiana, Shelby County, Ala.

Gentlemen:

Tax Assessor—plat book—compensation for making same.

Opinion by Assistant Attorney General Smith.

I have your letter of April 10, 1929, in which you state as follows:

"The Tax Assessor of this County has filed a claim for \$400 for posting the Lot and Land Book, which he is required by law to keep."

Upon this statement of facts you request the opinion of the Attorney General on the following questions of law:

1. Is this a legal claim against the county?
2. Is this a service to be performed and paid for annually?

In answer to your two questions I am herewith enclosing you an opinion written by Assistant Attorney General Evans to Hon. Charles E. McCall, Chief Examiner of Accounts, under date of March 12, 1928.

The enclosed opinion answers the questions that you have propounded.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1929.

The Judge of Probate,
Fort Payne, DeKalb County, Ala.

Dear Sir:

Peddlers—Certificate of disability does not exempt from road duty.
Road duty—one who obtains disability certificate as peddler not exempt from road duty by such certificate.

Opinion by the Attorney General.

I have your letter of April 11, 1929, in which you request my opinion:

Does a certificate from the county health officer as to a person's disability, which exempts him from having to procure a peddler's license, also exempt him from road duty and entitle him to other exemptions?

In answer to your question will state that I am of the opinion that such certificate, obtained in compliance with those provisions of law as to exemption from peddler's license, and used for that purpose, does not, of itself, furnish a sufficient basis for exemption from road duty.

The exemption from peddler's license reads as follows:

"Provided that no peddler's license shall be required of Union and Confederate Veterans of the Civil War, nor of persons totally blind, nor of persons who are physically disabled to do manual labor, who shall obtain a certificate from the county health officer as to such disability, * * * "

Schedule 80 of Section 361 of an Act approved September 15, 1919 (General Acts 1919, p. 425).

This Schedule simply requires that if one is totally blind or disabled to do manual labor, and desires to obtain a peddler's license that may be otherwise required, he shall first obtain a certificate from the county health officer as to such disability.

In order to exempt a person from road duty the provisions of those statutes permitting exemptions from road duty must be strictly followed.

Section 164 of an Act approved August 23, 1927 (General Acts 1927, p. 393), which is a re-enactment of Section 1354, Code of Alabama, 1923, and Section 45 of an Act approved September 9, 1927, are the statutes permitting exemption from road duty. There may be other statutes dealing with specific classes and persons in particular types of municipalities or counties, but they need not be here considered. Section 164 of the Act approved August 23, 1927, *supra*, is the statute intended to apply generally. That Section of said Act exempts from road duty, among other persons:

" * * * All persons who have lost an arm or leg; and all persons who, by nature or disease, are rendered incapable of hard labor, who shall obtain a certificate of such incapacity from the county board of health, * * * but where there is no county board of health, the certificate of such incapacity from two reputable practicing physicians shall be sufficient. * * * "

It is evident that where a disability certificate has been obtained in a certain manner provided by one statute to be used for the purpose of obtaining exemption from the things required by that particular statute, then that certificate cannot be used in obtaining exemption from the requirements of another statute, particularly where the method of obtaining the certificate is provided in each case and is not necessarily identical.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1929.

The Judge of Probate,
Centreville, Bibb County, Alabama.

Dear Sir:

License Tax: Examiner pays license in his name.

Opinion by Assistant Attorney General Cobb.

I have your letter of March 15, 1929, in which you request my opinion construing Schedule 38 of Section 361, of an Act approved Sept. 15, 1919 (General Acts 1919, p. 408). You ask specifically to be advised if a dealer in coffins must take out a license for each embalmer employed by him, or, if the embalmer is required to take out the license in his own name.

Schedule 38, supra, reads as follows:

"Schedule 38. COFFINS, DEALERS IN.—Each dealer in coffins in unincorporated places or towns of one thousand inhabitants or less, ten dollars; in towns and cities of over one thousand inhabitants and not exceeding seven thousand inhabitants, twenty-five dollars; in cities of over seven thousand and not exceeding thirty-five thousand inhabitants, fifty dollars; in cities of over thirty-five thousand inhabitants, one hundred dollars. For each embalmer, ten dollars."

It is my opinion that if a coffin dealer employs one or more embalmers, each embalmer should take out a license in his own name.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1929.

The Judge of Probate,
Marion, Perry County, Alabama.

Dear Sir:

License—Chauffeurs—Drivers of delivery trucks for mercantile establishments and drivers of delivery trucks for oil concerns not required to obtain chauffeurs' license.

Opinion by the Attorney General.

I have your letter of April 16, 1929, in which you state that the License Inspector of your county is citing a number of people for delinquency in connection with a chauffeurs' license. You request my opinion:

1. Do drivers of trucks or other motor driven vehicles used by mercantile establishments for delivery of goods to retail customers have to procure chauffeurs' licenses?

2. Do drivers of oil tank trucks who deliver gasoline and oil to re-tailers or to consumers have to procure chauffeur's license.

You state that in each of the above cases the trucks are used for delivery of the commodity in which the owner of the truck deals and that the trucks are not available to the general public for hauling.

In answer to both of your questions will state that a Chauffeur's license is not required.

City of Montgomery v. Orpheum Taxi Co., 82 So. 119.

Opinion Attorney General 1918-1920, p. 356.

Opinions Attorney General 1920-1922, pp. 5 and 33.

Opinions Attorney General 1924-1926, p. 34.

In order to subject one to a chauffeur's license, the motor vehicle must be devoted to a **public use**. That is, it must be open for hire by persons desiring to use it. The motor vehicles mentioned by you are not devoted to a public use and the license inspector is in error in citing such parties.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

May 9, 1929.

The State Tax Commission,
CAPITOL.

Gentlemen:

License—Architects to pay for each member of firm doing business in this State.

Opinion by Assistant Attorney General Smith.

I have your letter of May 2, 1929, in which you state as follows:

"A firm of architects located outside of Alabama draws plans for a building to be constructed in Alabama, which plans are accepted and under which plans the building will be constructed. The plans were drawn at the office outside the State. Of course, when the building is under construction, some representative of the non-resident firm of architects must come into the State for the usual inspection as made by architects as work progresses."

Upon this statement of facts you request the opinion of the Attorney General on the following questions of law:

1. Would an architect under the above circumstances be liable for license under Section 6 of an Act of the Legislature 1927, p. 139.

2. If the firm of architects is composed of more than one member, should license be collected from each member of the firm or only from the representative of the firm who comes into Alabama for the purpose of making usual inspection and estimates on buildings under construction, and under their supervision?

Answering both of your questions, I am of the opinion that if an architect doing business outside of the State of Alabama, draws plans and specifications for a building being erected in the State of Alabama, and comes into the State of Alabama, to supervise the construction of said building or does any act in executing said plans or specifications in this State, he or any member of the firm who comes into this State to execute plans and specifications, shall pay to the State a license tax of \$25.00 as provided in Section 6, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1929.

The Sheriff,
Hamilton, Marion County, Alabama.

Dear Sir:

Requisitions—When Sheriff will be paid expenses for conveying party back to this State for trial.

Courthouse—Who is in charge, and who employs janitor for same.

Opinion by Assistant Attorney General Haynes.

I am in receipt of your letter of April 10, 1929, in which you state:

First. That you had a party confined in jail charged with a felony; that he broke jail and was recaptured in another State, and that he later plead guilty and was sentenced to the penitentiary.

Second. That a party stole a car in your County, and you recovered it in Tennessee, arresting the man in possession of same, and brought him back to Alabama, where he was acquitted.

Third. That, as Sheriff of your County, you have a janitor for the Courthouse, and a controversy has arisen as to who is in charge of the Courthouse, and who has the right to appoint the janitor.

You request my opinion:

1st. How am I to receive pay for bringing the parties back under arrest under the circumstances set forth in the statement of facts set forth above in paragraph one and two?

2nd. Who is in charge of the Courthouse, and who has a right to appoint a janitor therefor?

I presume that before you left for the party referred to in your first inquiry, you had secured a requisition for his apprehension and return, and that you returned him to the State of Alabama under these papers. If this be true, you would be entitled to pay on warrant drawn by the State Auditor on the approval of the Governor, unless the Governor in issuing requisition papers made some exception in this case.

Answering your second inquiry, there is no provision of law for you to obtain pay for going to Tennessee, and returning said party, for the reason that he was acquitted. The Governor, under a rule established by him, will not approve such expenses **unless the party is convicted.**

Answering your third inquiry, will state that the power to employ a janitor for the courthouse is granted only to the Court of County Commissioners.

Subsection 2, Section 6755, Code of Alabama, 1923.

Under the law the sheriff has charge of the courthouse and courthouse grounds for law enforcement purposes, but the general control over the **property** is vested in the Court of County Commissioners.

Subsection 1, Section 6755, Code of Alabama, 1923, as amended by an Act approved Feb. 18, 1927.

Office Edition, opinion of Attorney General, Vol. a, 1925, p. 242.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 10, 1929.

The Director,
State Highway Department,
CAPITOL.

Highways—Contractors—Bond of—Under facts stated in opinion, money should be paid to surety on bond.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of May 9, 1929, is acknowledged. You make the following statement of facts:

On the 14th day of January, 1927, the Highway Commission entered into contract with one S. C. Taylor for the construction of Project F. A. P. 186: Choctaw County. As provided by law, and the rules and regulations of the Highway Commission, the said S. C. Taylor gave bond to secure the performance of his part of the contract. On this bond, the United States Fidelity & Guaranty Company, a corporation under the laws of Maryland, was surety. This bond was duly accepted by the Highway Commission.

Under the terms of the contract, other than the provisions of the bond, it was provided that partial payments should be made as the work progressed. This part of the contract reads as follows:

"Partial payments will be made monthly, provided the work is progressing to the satisfaction of the engineer. The total amount of such payments at any time before final completion shall not exceed 85 per centum of the relative value of the work done as estimated by the engineer. Estimates of the relative value of the work performed will be made by the engineer on or near the last day of the month in which work was done, and payment therefor will be made about the 10th of the succeeding month."

The contract, on the part of said S. C. Taylor, provided for full construction of the project and maintenance thereafter for thirty days.

After construction had been nearly completed and after the Highway Commission had paid over to him 85 per cent of the contract price—all that was due or permissible under the law and under the terms of the contract—the said S. C. Taylor abandoned the work, and the said surety, United States Fidelity & Guaranty Company, thereupon, being called upon by the Highway Commission, as provided by terms of said bond, took charge of the work and completed the construction and maintained the constructed project for thirty days thereafter as provided by the contract.

One of the provisions of the bond was as follows:

"Provided, further, that upon the failure of the said S. C. Taylor promptly and efficiently to prosecute said work, in any respect, in accordance with the contract, the above bound United States Fidelity and Guaranty Company, as sureties, shall take charge of said work and complete the contract at their own expense, pursuant to its terms, receiving, however, any balance of the funds in the hands of the State due under said contract."

On abandoning the contract, the said S. C. Taylor was declared a bankrupt.

You wish my opinion as to the proper disposition of the fifteen per cent of the contract price which was retained by the Highway Commission to be paid over on full completion of the contract—whether it should be paid into the bankrupt court as part of the estate of said S. C. Taylor or to the United States Fidelity and Guaranty Company as provided in the bond.

In reply will say that, since all of the contract price has been paid to S. C. Taylor that was due or permissible at the time he abandoned the contract, he, thereby, forfeited all further rights in the contract, and since it was provided in the bond that, in such contingency, the surety should take charge and complete the work contracted for and in consideration thereof should receive any balance of the funds in the hands of the State, it is my opinion that the retained fifteen per cent should be paid to the surety, United States Fidelity and Guaranty Company, since to do so is strictly in accordance with

the terms of the bond executed by said S. C. Taylor and his surety and accepted by the Highway Commission. It is my opinion that no part of said retained fifteen per cent constitutes any part of the estate of said S. C. Taylor, bankrupt.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 10, 1929.

The Judge of Probate,
Scottsboro, Jackson County, Alabama.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 20, 1929, together with copy of an account presented to the Commissioners Court of your County by the County Superintendent of Education which account is for telephone service for the office of the County Superintendent of Education from October 1, 1918, to March 31, 1929, inclusive, at \$2.50 per month, less \$75.00 paid by the Jackson County Farm Bureau, making a total amount of \$240.00. This account appears to have been presented on or about April 20, 1929.

You request my opinion:

May the Commissioner's Court of the County legally allow the account above stated?

Telephones—Telephone accounts for county officers must be presented within twelve months.

In my opinion it cannot. The Commissioner's Court may allow only that part of the account which was presented within twelve months after the time it accrued or became payable. It is evident that the telephone rent of this particular officer accrued and became payable monthly and hence only that part of the monthly account which accrued and became payable monthly within twelve months preceding its presentation may be paid.

Also, before the Commissioner's Court allows any part of the account it may demand an itemized statement of same.

Under Section 169, Alabama School Code, 1927, this office has held that it is the duty of the Commissioner's Court to furnish the County Superintendent of Education with a telephone. However, in the allowance for claims against the county Section 228, Code of Alabama, must be strictly followed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 10, 1929.

The County Superintendent of Education,
Union Springs, Bullock County, Alabama.

County Board of Education: Three members of the County Board of Education entitled to hold special meeting and receive per diem and expenses.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of May 3, 1929, in which you advise that the President of the Bullock County Board of Education called a special meeting of the Board for Friday, May 3, 1929, but at this meeting both the President and Vice-President were absent. You further state that three members of the Board were present and that they appointed Dr. J. W. Thomason as presiding officer and that the matters for which the meeting was called were duly passed upon by the three members present.

You request my opinion:

1. Was this procedure legal and are the matters passed upon binding?
2. Are the members present legally entitled to have their names placed on the pay roll for expenses incurred in attending this meeting?
3. Are they entitled to draw per diem for this meeting?

Answering your first inquiry I am of opinion and so advise you that the procedure was legal, provided due notice of the special meeting was given all members of the Board and the matters passed upon were such as the County Board of Education were authorized to pass upon. If the matters passed upon were such as were authorized by the Board and due notice was given all members of the Board, the business transacted at such special meeting would be legal and binding.

Answering your second inquiry, I am of the opinion and so advise you, in the light of my first answer, that the three members who were present are legally entitled to have their names placed on the pay roll for all necessary legal expenses incurred at such meeting.

Answering your third inquiry I am of opinion and so advise you, in the light of my first answer, that the said three members are entitled to draw their legal per diem allowed by law provided that the County Board of Education has not held session exceeding twelve days in the fiscal year. Section 7 of the Alabama School Code, 1927, provides among other things that the County Board of Education shall be composed of five members and in the meeting above referred to there were present a majority of members and this constituted a quorum for the transaction of business.

Section 91 of the School Code provides among other things that such special meeting may be held, and at such place as the duties and the business of the Board may require. There is no special provision in the School Code

which requires that special meetings must be called by the President or Vice-President and the three members of the Board were entitled to hold a special meeting and transact such legal business for which the special meeting was called, provided the State Board of Education or the County Board of Education has not heretofore adopted rules and regulations to the contrary.

Section 91 of the School Code, *supra*, further provides as follows:

"The rules generally adopted by deliberative bodies for their government shall be observed by the County Board of Education. No motion or resolution shall be declared adopted without the concurrence of the majority of the whole Board."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 11, 1929.

Hon. Theo F. May, President,
Escambia County Jury Commission,
Brewton, Escambia County, Alabama.

Dear Sir:

Jury Commission—Clerk for Jury Commission—qualifications.

Opinion by the Attorney General.

I have your letter of May 6, 1929. In it you request my opinion:

May the Jury Commission of a County employ a State or County officer to serve as clerk to said Commission?

In answer will state that in counties have 75,000 or less population by the last **Federal** census **preceding the employment**, the clerk of the circuit court may be employed as Clerk of the Jury Commission, but in other counties, the Clerk of the Circuit Court may not be so employed. Section 8581, Code of Alabama, 1923, is a full answer to your inquiry, and states that no person, except as otherwise provided, shall be eligible to be appointed or to hold office as a clerk of a Jury Commission, who holds any office under the Federal, State, County or municipal governments, or who is a deputy, clerk, assistant clerk, or employee of any such offices.

Chapter 311, Vol. 4, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 11, 1929.

The Judge of Probate,
Selma, Dallas County, Alabama.

Licenses—Repair of motor vehicles—painting automobiles—Schedule 11-A of Section 361 of an Act approved Sept. 15, 1919 (General Acts 1919, p. 401) construed.

Opinion by the Attorney General.

Gentlemen:

I have your letter of May 8, 1929. You state that a party has operated a work shop in Selma for about forty years engaging primarily in repairing and building wagons, buggies and the like and painting same. As time has passed, automobiles were sent into his place to be painted and for minor repairs to parts of cars, but not to any of the machinery of the automobile. You state that the main business of the concern is still the manufacture and repairing of wagons and minor repair work on cars. You further state that the party contends he has never at any time operated a garage; that his shop is the same it has always been and is nothing more; that if it is a garage now, it was a garage forty years ago.

Upon this statement of facts you assert that the solicitor and the attorney for the defendant have agreed and it has been understood that my opinion on the matter would be satisfactory to all parties.

You request my opinion:

On the above statement of facts is said party liable for a license under Schedule 11-A of Section 361 of the Act, supra, for operating a garage for the repair of motor vehicles?

In answer will state that he is.

This office has held that under said Schedule, the painting of automobiles constitutes repairing as the word is used in said schedule.

Opinions Attorney General, 1924-1926, p. 100.

The above cited opinion was rendered during the administration of my predecessor. The fact that the party in question does not keep a place for the storage of motor vehicles is immaterial. Schedule 11 of Section 361, supra, is a proper license on a storage garage. In this instance, however, without doubt, the party is operating a repair garage for motor vehicles, even though he may be doing some other additional business thereat.

It is immaterial that his main business is the repair of buggies and wagons and the like. If he engages in the repair of automobiles in that place of business, then that place becomes a repair garage within the revenue statutes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

Dr. W. A. Black,
County Health Officer,
Ft. Payne, DeKalb County, Ala.

License—peddlers—exemption—disability certificate not based on property owned.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 14, 1929. You state that as County Health Officer, you have found numbers of those persons who request exemption from peddler's license to be the owners of considerable property.

You request my opinion:

Is it the duty of the County Health Officer in issuing a disability certificate under Schedule 80 of Section 361 of the Act approved September 15, 1919, to be governed in the issuance of same by the amount of property owned by the applicant?

In answer to your inquiry will say no.

Schedule 80 of Section 361 of an Act approved September 15, 1919 (General Acts, 1919, p. 425) which deals with exemptions from peddler's license, does not make the ownership of property the criterion as to the exemption, but makes the physical incapacity to do manual labor the basis of such an exemption.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The State Tax Commission,
CAPITOL.

Taxation: Property of apiarists subject to taxation.

Opinion by Assistant Attorney General Cobb.

Attention. Mr. John S. Tilley, Associate Member.

Gentlemen:

I have your letter of March 7, 1929, in which you state that returns have heretofore been made in Lowndes County on bee colonies, but that for the current year the bee keepers have declined to make any returns on this property.

You request my opinion:

Are bee colonies and queen bees included in subjects of taxation under the revenue laws of Alabama?

I am of the opinion that bee colonies and queen bees are the subjects of taxation under the revenue law of Alabama. While I do not find the property of apiarists and breeders of queen bees especially mentioned in the revenue laws of this State, this property is subject to taxation under the provisions of Subdivision (m) of Section 5 of an Act approved September 15, 1919 (Acts 1919, p. 287).

That part of Section 5, supra, which is pertinent to your inquiry reads as follows:

"Section 5. The subjects of taxation, except as exempt by existing law, shall be as follows: * * (m) All other property, real, personal and mixed, not hereinbefore specified."

There is no law specifically exempting this property from taxation, consequently the tax on it should be assessed and collected just as the tax is assessed and collected on other property not specifically exempted from taxation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The Judge of Probate,
Russellville, Franklin County, Alabama.

Licenses—Trucks used exclusively for transferring children to and from school—No truck license required.

Licenses—Drivers of trucks used exclusively for transferring children to and from school subject to chauffeur's license.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 12, 1929. In it you state that the County Board of Education of your County contracted this year with individuals to transport school children to and from schools: that prior to this year, the County Board owned their own school buses or trucks, and hired drivers for them, and the Board in this way, transported the children. You further state that at that time you did not charge anything for the truck or bus tags for the motor vehicles that the County Board owned and used for no other purpose other than the hauling of school children, except the fee of fifty cents as provided by statute, but that when the Board discontinued this

method of transporting the children and contracted with individuals to use their own private trucks and haul these children, you felt that these individuals should buy the required tags, and pay the same price for them as persons contracting for any other kind of hauling. You also state that the State Tax Commission has just sent you a ruling to the effect that no school truck or bus should be required to have a tag if the truck or bus is used exclusively for transporting children to and from school. You say that all of the trucks and buses used are equipped with special bodies made for them, and that such trucks or buses cannot well be used for any other purpose. You further state that you are making arrangements to obtain a refund from the State and County for those licenses paid in error, but, before doing so, you desire an opinion from the Attorney General.

Upon this statement of facts you request my opinion:

Where individuals own trucks or buses and contract with the County Board of Education for transporting children to and from school, and use said trucks or buses for no other purpose, but the individuals are paid monthly for their services, are the owners or operators of such trucks or buses, required to take out licenses for said truck or buses, and pay the same price therefor as persons using other trucks for other purposes?

In my opinion such trucks or buses are not subject to license, and need not carry tags.

Your attention is invited to Section 17 of an Act approved July 22, 1927 (General Acts 1927, p. 158), dealing with truck licenses, the pertinent part of which reads as follows:

" * * * provided this Section does not apply to automobile trucks used exclusively for transferring children to and from school * * * "

You will see, therefore, that, in the above case, it is the use that governs in this exemption, and that the use must be **exclusive**. If the truck is devoted to any other use than that of transporting children to and from school it is subject to a license.

It might be well also to invite your attention to another portion of the same Section of said Act, which reads as follows:

"Motor trucks or motor vehicles used by the State or County or any municipality of this State shall not be liable for the payment of this tax, but shall carry tags."

(See also Section 22, Act approved Sept. 13, 1923 (Gen. Acts 1923, p. 291).

Construing the above and other related portions of the Revenue laws with regard to licensing motor vehicles, this office has held that where a motor vehicle is owned and used by the County Board of Education, it is owned and used **by the State**, since the County Board of Education is a governmental instrumentality of the State, and it is apparent that those things

which are owned by the County Board of Education are not owned by the County. Therefore, this office has held that the proper place to obtain a tag for a motor vehicle owned and used by a County Board of Education is from the Judge of Probate of Montgomery County alone, since tags for all State owned vehicles must be obtained through that office. Hence you have no authority to issue a license tag for a motor vehicle owned and used by your County Board of Education.

Attention is also invited to the fact that this office has ruled that the automobiles owned by employes of County Boards of Education are not exempt from the license tax. This, as stated above, does not apply to school trucks devoted exclusively to transporting school children to and from school.

In connection with the whole matter, I desire to invite your attention to the fact that where an individual contracts with a County Board of Education to transport children to and from school, and for that purpose uses his own truck, which he devotes exclusively to that use, then the chauffeur for such truck is subject to a chauffeur's license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The Judge of Probate,
Chatom, Washington County, Alabama.

Dear Sir:

Fees—Judges of Probate—entitled to fee of twenty-five cents for attesting satisfaction of mortgage by person acting under power of attorney. Sec. 7285, Code of Ala., 1923, construed.

Opinion by Assistant Attorney General Smith.

I have your letter of April 18, 1929, in which you request the opinion of the Attorney General on the following question of law:

Is the probate judge entitled to collect a fee of twenty-five cents for attesting each satisfaction of a mortgage where the satisfaction is made by a person acting under authority of a power of attorney?

I am of the opinion that the probate judge is entitled to a fee of twenty-five cents for attesting each satisfaction of a mortgage, whether it be satisfied by the owner of said mortgage or his duly authorized agent acting under power of attorney. This fee is allowed under Section 7285 of the Code of Alabama, 1923 (p. 599, Vol. 3).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

Hon. Walter W. Roane,
Notary Public Ex-Officio Justice of the Peace,
142 East Lake Boulevard,
Tarrant, Jefferson County, Alabama.

Dear Sir:

Fish Laws—Seining—in streams wholly on premises of another—
Section 4065 Code of Alabama construed.

Opinion by the Attorney General.

I have your letter of April 16th, 1929. In it you state that three men were found seining for minnows in a small stream of water which is wholly on the premises of a party who objected to the act, and that the land was also posted. You further state that the parties seining did not have permission from the land owner to seine for the minnows and that the minnows were being taken for commercial purposes, viz: to sell for bait.

You request my opinion:

Under the above statement of facts was the act of the parties seining a violation of Section 4065, Code of Alabama, 1923?

In my opinion, the act of the parties seining was not a violation of Section 4065 of the Code, supra. In my judgment said Code section was intended to cover ponds, pools, lakes or other reservoirs or other **like** bodies of water, **but was not intended to cover running streams**. Other sections of the Code show clearly a distinction drawn by the Legislature between **running streams** and ponds, pools, lakes, reservoirs and like bodies of water.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The Judge of Probate,
Grove Hill, Clarke County, Alabama.

Courts of county commissioners—Toll bridges authorized under Act of Congress not under supervision of Courts of County Commissioners.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 10, 1929, in which you submit the following statement of facts:

Recently Congress passed a law granting J. E. Robinson of Coffeeville, Alabama, the right to build a toll bridge across the Tombigbee River at that point.

Upon this statement of facts you request the opinion of the Attorney General upon the following question of law:

In view of the Act of Congress referred to above granting J. E. Robinson a right to build said toll bridge at Coffeeville, Alabama, would the Court of County Commissioners of Clarke County also have to grant Robinson a permit to construct this bridge under Section 6445 of the Code of Alabama, 1925.

The Act of Congress approved March 2, 1929, authorizes J. E. Robinson to construct, maintain and operate a toll bridge at Coffeeville, Alabama, and recites that it is for the purpose of promoting interstate commerce, improve the postal service and provide for military and other purposes. This Act amply safeguards the interest of the State of Alabama, and the County.

This is a subject that Congress has a right under the Constitution of the United States to regulate. I am, therefore, of the opinion that Section 6445 of the Code of Alabama, 1923, has no application to toll bridges constructed under an Act of Congress for the purpose of promoting interstate commerce, improving the postal service and providing for military and other purposes. The Court of County Commissioners has no duties to perform in the construction or operation of the bridge authorized under this Act of Congress.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The County Superintendent of Education,
LaFayette, Chambers County, Alabama.

Dear Sir:

Schools—Use of public school funds in making improvements on privately owned property.

Opinion by the Attorney General.

I have your letter of April 19th, 1929, in which you invite attention to a former opinion of this office relating to the use of county school funds and district tax in making permanent improvements on school property not deeded to the State. You enclose a copy of a form contract promulgated by the State Department of Education to be used by County Boards of Education for the rental of privately owned school houses. Paragraph 3 of that contract provides that desks, seats, blackboards, charts, shades, etc., placed in such a building by the County Board of Education, also sanitary toilets erected by said Board, may be removed at the Board's discretion when the best interest of education in the community require it. In view of this form contract, and in the light of the former opinions of this office, you request my opinion:

Where the County Board of Education enters into a contract, in the form provided, for the rental of a privately owned building and property to be used as a public school, it is legal for the County Board of Education to expend district tax or other county school funds in erecting upon said property a sanitary toilet, provided that, in the contract, the right is reserved in the County Board of Education to the title to such property, and to remove it?

In my opinion, based on the facts and the form of contract mentioned, the erection of a sanitary toilet on such school grounds would not be considered a permanent improvement, and a reasonable amount of the proper special three mill county or district school tax could be used in erecting it.

I think that your rental contract would take care of such a situation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The Securities Commission,
CAPITOL.

Gentlemen:

Securities Commission: No jurisdiction over Dillon's Funeral Home which sells Thrift Certificates providing for funeral expenses.

Opinion by Assistant Attorney General Cobb.

I have your letter of January 18, 1929, in which you submit an opinion of this office rendered the Department of Insurance on September 6th, 1928, anent Mutual Aid Benefit and/or Industrial Insurance Companies or Associations, which opinion holds that a certain family thrift certificate sold by the Dillon's Funeral Home of Birmingham, Alabama, does come under the provisions of an Act approved July 29, 1927 (Acts 1927, p. 215).

You direct my attention to Sections 9878, Subsections (c) and (d) and to Section 9882 of the Code of Alabama, 1923. You further direct my attention to Section 1 of an Act approved July 29, 1927 (Acts 1927, p. 215).

It appears that the business of the Dillon's Funeral Home, and similar companies, consists of selling burial certificates on a partial payment plan, and the assumption of the obligation by the Company to furnish free of further funeral cost, a funeral upon the death of the holder of such certificate. These certificates carry certain other obligations of the company which it is not necessary to set out in detail.

You request my opinion:

1. Is the jurisdiction of the Dillon Funeral Home and similar companies selling burial certificates on deferred payments vested in the Department of Insurance?

2. Does the Act approved July 29, 1927, vesting jurisdiction of such companies in the Insurance Commissioner repeal all laws in conflict therewith and vest exclusive jurisdiction over such companies from applying to the Securities Commission for registration of such certificates before selling or offering same for sale?

Replying to your first inquiry, I am of opinion the jurisdiction is vested in the Department of Insurance.

Replying to your second inquiry, I am of opinion that the Act approved July 29, 1927, supersedes Section 9878, Subsection (c) and (d), and Section 9882 of the Code of Alabama, 1923, and vests exclusive jurisdiction in the Superintendent of Insurance, and, therefore, the Dillon Funeral Home, and similar companies, would not be required to register their certificates before selling or offering same for sale in addition to procuring the license mentioned in Section 1 of the Act approved July 29, 1927 (Acts 1927, p. 215).

See Opinion of Attorney General, rendered Superintendent Dept. of Insurance, Sept. 6, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

The Judge of Probate,
Wetumpka, Elmore County, Alabama.

Licenses—Photographers—Schedule 79 of Section 361 of an Act approved Sept. 15, 1919 (General Acts, 1919, p. 425) construed.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 7th, 1929. In it you request my opinion:

Where a photographer does business at a fixed location only is he required to obtain a license under Schedule 79 of Section 361 of the Act above mentioned?

In order to answer your question it is necessary to analyze said Schedule 79. The first clause of that Schedule reads as follows:

"For each photograph gallery, person, firm or corporation engaged in photography, whether the business is conducted at a fixed location:
* * *"

After this clause follows a schedule of licenses in cities and towns dependent upon population, and then in all other places. After this schedule appears the following:

"The payment of the license required by this schedule shall authorize the doing of business only in the town, city or county where paid.
* * * "

Then, the last sentence of said Schedule reads as follows:

"For each transient or traveling photographer, five dollars in each county in which he does business."

In an opinion rendered October 20, 1919, to the State Tax Commission, this office held:

"According to my interpretation of this Schedule two general classes of photographers are affected by its provisions: i.e. the 'transient or traveling photographer who is taxed \$5.00 in each county in which he does business,' the other general class including all photographers who do not go beyond the bounds of one county, as to which there is a sliding scale of charges, ranging from \$10.00 for cities or towns of 1,000 to 7,000 people, to \$75.00 for cities of 75,000 inhabitants or more; and for every person operating throughout a county outside of towns and cities of over 1,000 people there is a charge of \$5.00.

"The scale of license referred to, in my opinion reaches every photographer regardless of 'whether the business is conducted at a fixed location.' It seems to me that the expression 'whether the business is conducted at a fixed location' is mere surplusage, and that the schedule may be better understood by reading it as if that clause did not appear therein.

"I am of the opinion that it was the intention of the Legislature to say 'whether or not,' etc., 'Each—Person—engaged in photography' in a county includes those operating at a fixed location as well as those who do not confine their operations to a certain locality, so it seems to me the expression 'whether' etc., is surplusage and means nothing.

"The clause is to be interpreted as if the Legislature had used the expression 'whether or not' etc., for the expressions 'whether' and 'whether or not' have been held to be synonymous.

Thurmond v. State, 79 S. W. (Tex.) 316, 317.

Wade v. State, 109 S. W. (Tex.) 191.

* * * *

"As to persons operating in more than one point in a single county, I think he is subject to a charge of \$5.00 for doing business throughout the entire county so long as he does not operate in cities or towns of more than 1,000 inhabitants, and if he should operate in a city or town of over 1,000 people he is subject to the tax set out in the sliding scale for each such city or town, for it is provided that 'the payment for the license required by this schedule shall authorize the doing of business only in the town, city or county where paid.'

"The sentence as to transient photographers reading 'For each transient or traveling photographer, \$5.00 in each county in which he does business,' appears last in the schedule, but I am of the opinion that

all which precedes applies to it, and that if such traveling photographer operates in cities and towns of over 1,000 inhabitants he is also subject to tax under the sliding scale; for if not, he could do business in the large cities of the State, by paying the county \$5.00, while those permanently located in any of such cities must pay the full license for the privilege of doing business at only one point. I can see no reason for the Legislature having added a special clause about transients for the law expressly previously states that the tax when paid only applies to the town, city or county in which it is so paid."

Opinions Attorney General 1918-1920, p. 310.

The above seems fully to answer your inquiry.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

Superintendent,
State Child Welfare Department,
CAPITOL.

Gentlemen:

Postage: County Child Welfare Superintendent to have necessary postage furnished by the County.

Opinion by Assistant Attorney General Cobb.

I have your letter of May 2, 1929, in which you direct my attention to Section 147, Code of Alabama, 1923, and to Section 169 of the Alabama School Code, 1927.

You state that one of the probate judges has questioned the right of the Court of County Commissioners to pay for the postage used by the County Child Welfare Superintendent, who is Probation Officer for the Juvenile Court and also School Attendance Officer for the county school system.

You request my opinion:

Is the Court of County Commissioners authorized by law to pay for the necessary postage used by the above mentioned officer?

The answer to your inquiry is in the affirmative. Section 147 of the Code of Alabama, 1923, *supra*, reads as follows:

"Office and Supplies Furnished by County.—Office space and supplies shall be provided for the county board of child welfare and its executive agent or agents and the expense of such provision shall be a valid charge against the county."

It is my opinion that the word "supplies" in the above quoted Section includes postage and that the expense for such postage constitutes a valid charge against the County. The County Child Welfare Superintendent being an executive agent of the County Board of Child Welfare is therefore entitled to the necessary postage in the discharge of his official duties. Section 160 Ala. School Code, 1927, has no bearing on the subject.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

Judge of Probate,
Elba, Coffee County, Alabama.

Dear Sir:

Costs and Fees: Sheriff entitled to removal bill only when statute is strictly followed.

Opinion by Assistant Attorney General Cobb.

I have your letter of March 5, 1929, in which you state among other things that you do not find authority for the payment of removal bills of Sheriffs for the removal of prisoners charged with misdemeanors from another County to Coffee County.

If I understand you correctly, you state the following case: one, Ralph Clark was convicted in Coffee County for violating the prohibition law and turned over to the State under the provisions of an Act approved February 18, 1927 (Acts 1927, p. 52). Upon serving his sentence the Sheriff brought him from Reform back to Coffee County to answer to the charges against him and the order for removal was given by the Circuit Solicitor and not by the Judge, and the Sheriff has a claim against the County for the removal bill.

Under the above statement of facts you request my opinion:

Should the County pay this expense?

Answering your inquiry I am of opinion that the County should not pay this expense.

Section 3741 of the Code of Alabama, 1923, provides that the County shall bear such expense when the offense committed is a misdemeanor. It appears, however, that in the instant case the Circuit Solicitor gave the order for the removal.

Section 3734 of the Code of Alabama, 1923, reads as follows:

"No fee charged unless expressly authorized.—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

All costs and fees are of statutory origin and penal and must be strictly followed. When a fee or cost is claimed there must be some statute providing same and this statute must be strictly followed.

Opinion of Attorney General to Circuit Solicitor, Dothan, Alabama, April 29, 1929 (Book 10, p. 269, Office Edition).

Lee vs. Smyley, 16 Ala. 773,
Dent vs. State, 42 Ala. 514,
Trout vs. Morgan County, 109 Ala. 162.

Section 3744, Code of Alabama, 1923, reads as follows:

"Sheriff, being notified, applies to judge of probate for removal order.—The sheriff, upon receipt of such notification, shall apply to the judge of probate of his county for a removal order, having first secured the recommendation of the presiding judge of the county, or circuit solicitor, certifying that in the interest of justice the said order should be granted or issued."

I am of opinion that in the instant case the county should not pay the expense for the reason that the Sheriff failed to comply with the provisions of Section 3744, of the Code of Alabama, 1923, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 13, 1929.

Hon. R. L. Nathan,
City Attorney,
Sheffield, Colbert County, Alabama.

Dear Sir:

Officers—State Law Enforcement Officers—Their jurisdiction.

Opinion by Assistant Attorney General Haynes.

I have your letter of April 17, 1929, in which you state that the City of Sheffield has an adequate Police Department including a traffic officer. The Police Commissioner finds that there are certain State Officers constantly on duty within the city limits, and who are engaged in an effort to regulate and control the traffic conditions in your town, that there sometimes arises a conflict between these officers and the duly employed city officers relative to traffic violations.

You request my opinion:

Please give me the powers and jurisdiction of these State Law Enforcement Officers.

All State Law Enforcement Officers have general jurisdiction throughout the State. Their jurisdiction extends to every city, town, village and hamlet, as well as to country districts within the State, and there is no way to limit this jurisdiction. The Governor is executive head of such law enforcement machinery of the State, and he has the power to direct the operation of all State Law Enforcement Officers anywhere in the State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 14, 1929.

Hon. J. L. Fulton,
Deputy License Inspector,
Care Probate Office,
Bessemer, Alabama.

Dear Sir:

Motor vehicles—license tags on motor vehicles not subject to condemnation where the vehicle is used in transporting prohibited liquors.

License Inspector—may seize automobile tag being used by one not the owner thereof.

License Inspector—When he may otherwise seize and hold automobile tag.

License—Automobile license tags may not be legally replaced with imitation tags.

Opinion by the Attorney General.

I have your letter of May 4, 1929. In it you request my opinion:

1. Where the sheriff of a county has apprehended a motor vehicle transporting prohibited liquors and the court condemns the said vehicle, may the court also condemn the tag and may the sheriff sell the tag along with the motor vehicle?

2. Is it legal for a license inspector to remove an automobile tag from a motor vehicle and hold it until the real owner claims said tag?

3. Where a license inspector arrests a party for operating a motor vehicle with an improper tag, may the license inspector hold said tag as court evidence or until the party buys the proper tag.

4. Where a party has lost his license tag for a motor vehicle and makes application for a replacement and puts a paper tag with the original number on his car, is such a party subject to arrest for using an improper tag.

In answer to your first question will state that an automobile license tag is merely evidence of a privilege to operate a motor vehicle. It is not a part of the motor vehicle, nor is it an accessory. The court cannot sell it. It is of no value to anyone except the owner. It cannot be condemned by the court because it happened to be attached to a motor vehicle that was caught transporting prohibited liquors since condemnation proceedings must be with regard to the motor vehicle and accessories.

In answer to your second question will state that where a license inspector apprehends a party driving a motor vehicle with a tag attached thereto which does not belong upon said motor vehicle, but is a lost or stolen tag, the license inspector may arrest the party for operating the motor vehicle without a license, and may seize the tag which is on said vehicle and hold it for evidence and until the real owner claims the same, but the license inspector should report his action immediately to the State Tax Commission.

In answer to your third question will state that where a license inspector arrests a party for driving a motor vehicle with an improper tag attached thereto, the license inspector may seize the tag and hold it as the best evidence in the case pending against the party arrested. If the tag belongs to the party arrested it should be returned to him on the final determination of the proceeding.

In answer to your fourth question will state that, by Section 24 of an Act approved Sept. 13, 1923 (General Acts 1923, p. 292) it is unlawful for any person to use upon his car any tag in imitation of or substitution for the real tag, and when this is done the tag is illegally used. Under this law it would be illegal for one to use a paper tag on his car.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 15, 1929.

Hon. T. J. Rowell, Mayor,
Selma, Dallas County, Alabama.

Municipalities—payment of gasoline tax—Taxation—Excise tax on gasoline—Municipalities.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of April 20, 1929, is acknowledged. You ask my opinion upon the following:

A municipal corporation buys gasoline in interstate commerce. You wish my opinion as to whether or not such municipal corporation is due a gasoline tax to the State on gasoline withdrawn from storage by such municipality for strictly municipal purposes?

In reply will say that a municipal corporation is but a governmental instrumentality of the State and it is never presumed that a State intends to levy a tax upon itself or upon any of its governmental instrumentalities, in the absence of express legislative provisions to that effect. We have no such legislative provisions, and it is my opinion that gasoline withdrawn from storage by a municipal corporation for strictly municipal purposes is not subject to the gasoline tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 15, 1929.

The Probate Judge,
Selma, Dallas County, Alabama.

Dear Sir:

Courts of County Commissioners and Boards of Revenue: No authority to expend County funds in securing better freight rates on farm products.

Opinion by Assistant Attorney General Smith.

I have your letter of May 7, 1929, in which you state as follows:

"Freight rates on farm produce from various points in Dallas County to Selma were so high and discriminatory on certain articles, that it became necessary for the Board of Revenue to take some action. As this was expensive business, the Board of Revenue joined with the City of Selma in making a fight for better rates on this account. We considered that we were justified in so doing under the broad terms of subdivision 23 of Section 6755 of the Code of 1923, which provides for the appropriation of funds of the County for 'the purpose of developing, advertising and promoting the agricultural * * *' and all other resources of every kind of their respective counties, etc."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Has the Board of Revenue authority under Subdivision 23 of Section 6755 of the Code of 1923, to appropriate county funds for the purpose of making a fight for better freight rates on farm products from various points in Dallas County to Selma, the freight rates being high and discriminatory on certain articles?

In answer to your question it is necessary to consider the authority given to Courts of County Commissioners and Boards of Revenue under Subdivision 23 of Section 6755 of the Code of Alabama, 1923, along with Sections 9629 and 9622 of the Code which are as follows:

"9629. Commission charged with duty of regulating and controlling transportation companies.—The public service commission of Alabama is charged with the duty of supervising, regulating, and controlling, all transportation companies doing business in this state, in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses therein by such companies, and the commission shall, from time to time, prescribe and enforce against said transportation companies, in the manner herein authorized, such rates, charges, classifications of freight, storage, demurrage, and car service charges, rules, and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time alter or amend. Where the rates or charges for transportation of any articles, or property, or the classification of freight have been fixed or prescribed by statute, the commission shall not have power to increase such rates or charges, or change such classification in such manner as to increase such rates or charges. All rates, charges, classifications, rules, and regulations adopted or acted upon by any transportation company inconsistent with those prescribed by the commission acting within the scope of its authority, or inconsistent with those prescribed by any statute, shall be unlawful and void. And the commission shall enforce and require compliance with all the provisions of all laws now in force or hereafter enacted regulating railroads and other transportation companies or prescribing the duties thereof."

"9622. Commission shall visit every county and institute proceedings.—The commission, or one or more members thereof, shall visit the county seat of every county in the state at least once a year, for the purpose of hearing and receiving complaints, and examining and inquiring into and securing information as to the conduct and management of the several railroads in the state, connections with other railroads, and accommodations of passengers, delays and inconveniences by reason of improper connection, the provision as to depots, switch tracks, sidings, passenger stations, and accommodations required by law. Notice shall be given by circular letters of the time when such visits will be made to the several county officers for at least two weeks before such visit, and also by publication in a newspaper when the commission shall so order. It shall be the duty of the commission to institute or direct the institution of any and all proceedings or suits necessary for the correction and punishment of all violations of the law, or any of the rules or regulations of the commission which shall come to their knowledge without waiting for complaint thereof by a citizen."

After conferring the above powers and duties on the Alabama Public Service Commission, the Legislature appropriated large sums of money from the State Treasury to maintain the Commission, and provided for the employment of rate experts, clerks, inspectors and attorney to assist the Commission in performing their duties in and about the establishment of just

and reasonable freight and passenger rates in Alabama and to correct abuses or discriminations in existing freight and passenger rates. Thus the Legislature has set up a regular governmental agency and provided for officers to manage and look after the interest of the shippers of this State in reference to fixing just and reasonable freight and passenger rates and removing unjust discrimination if such exists. These instrumentalities may, at any time, be called into action by the Board of Revenue of Dallas County or by any of its citizens without expense to the county or its people for the purpose of hearing complaints, ordering investigations and giving such relief as may be just and equitable under the law and evidence in the case.

I am, therefore, of the opinion that the Legislature having set up regular State governmental agencies and officers to manage and look after the interest of shippers in this State with reference to freight rates, the County Boards of Revenue could not fasten upon the County a binding liability to pay for the services of persons in getting freight rates reduced or discriminations removed unless empowered to create the debt for such services by express authority or as a necessary implication from some authority given.

Walker vs. Bridgeforth, 62 So. 323.

It must be taken as settled in this State that counties, being governmental agencies of the State can only be made chargeable with and liable for such claims and demands as the law imposes on them, or authorizes or empowers them to contract for. This power may be derived either from expressed authorization of the law, or by necessary implication.

Mobile vs. Drago, 172 Ala. 155,

Naftel vs. Montgomery County, 127 Ala., 563,

Jack vs. Moore, 66 Ala. 184.

Walker vs. Bridgeforth, 62 So. 323.

I do not believe that the Legislature of Alabama ever intended that County Courts of Commissioners or County Boards of Revenue should expend County funds for the purposes set out in your letter, either expressly or by implication under Subdivision 23 of Section 6755 of the Code of Alabama, 1923. It is true, to some extent, that the hiring of a person to secure lower freight rates on farm products might promote agricultural development, and so would buying fertilizer for the farmers by the County Board of Revenue promote agricultural development. Certainly no one would contend that the Board of Revenue could expend county funds for buying fertilizer for the farmers just because it would promote agricultural development.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 15, 1929.

State Board of Administration,
State Capitol,
Montgomery, Alabama.

Gentlemen:

Motor vehicles—License for—When applicable to persons living on military reservation.

Motor vehicles—Owned and used by U. S. Government—Not required to bear State license plates.

Opinion by the Attorney General.

I have your letter in which you state that the State Board of Administration has received an order from Maxwell Field, U. S. Army Air Service, Montgomery, Alabama, for one hundred automobile license plates, and you assume that these plates are being ordered in the belief that it is not required that regular State license plates for motor vehicles be used. In the light of the above statement you request my opinion:

1. May an army officer, or any other member of the military forces, or the civilian personnel, in the U. S. Service, while located on the U. S. Government Reservation, known as Maxwell Field, be relieved of paying the regular State license for operating a motor vehicle owned by the particular officer, or other person mentioned, but used in part in Government service?

2. Are the automobiles or trucks owned by the U. S. Government, and used on or about Maxwell Field required to carry the regular State license plates for motor vehicles?

In answer to your first question will state that if an army officer, enlisted man, or member of the civilian personnel on the U. S. Military Reservation, known as Maxwell Field, owns an automobile, and operates it exclusively on the military reservation, there is no provision of law requiring the owner to take out a license thus to operate said motor vehicle. However, if such owner of the motor vehicle desires to operate it upon any public highway of the State, he must first take out a license to do so, and the vehicle must carry a proper license tag. The fact that it is devoted in part to Government service by the individual owning it is immaterial. Furthermore, it is a well known fact that persons residing on the military reservation known as Maxwell Field, Alabama, who own motor vehicles, do operate those vehicles over the public highways of the State, which are not a part of the military reservation, and in each such instance, if the person so operating said vehicle has not first obtained a license to do so, and a proper tag evidencing same, he is violating the State law.

In reply to your second question, will state that automobiles and trucks owned by the U. S. Government, and used on or about Maxwell Field, or anywhere else in the State of Alabama, are not required to carry State motor vehicle license tags.

I am passing, inasmuch as you have called my attention to the fact that you have received an order from Maxwell Field for one hundred license plates, I desire to state that, in my opinion, there is no law authorizing you to honor any such order. Also, my attention has been called to the fact that there have been issued to some party or parties at Maxwell Field, a large number of automobile license tags of a particular design, viz: "U. S. A. Maxwell Field, 1929". There is no provision of law for the issuance of such a tag. There is no provision of law for the expenditure of the public funds of the State for making any such tag. The use of the public funds of the State, by any department thereof, in making and delivering any such tags is unlawful.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929

The Sheriff,
Linden, Marengo County, Alabama.

Telephone—Sheriff's office—Commissioners Court to pay for official long distance calls.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 14th, 1929. In it you request my opinion:

Should the County pay the long distance telephone calls of the Sheriff's office of the county when said calls are strictly on official business?

In answer will say yes.

It is the duty of the commissioners court to provide telephones for certain county officers and amongst these is the sheriff, and, in my opinion, it was the intention of the Legislature, when it required commissioners courts to provide telephones, that said body should provide telephones adapted to the needs of the office. It is well recognized that a Sheriff of a county, being the chief law enforcement officer of the county, will often have to use the long distance telephone on official business.

This has been the repeated ruling of this office.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

The Judge of Probate,
Russellville, Franklin County, Ala.

Dear Sir:

Chauffeur's License.

Opinion by the Attorney General.

I have your letter of March 28, 1929. In it you request my opinion:

1. Where persons owning trucks are under contract with the county board of education for hauling school children, are such truck owners required to pay a chauffeur's license?

2. Where farmers owning trucks, occasionally haul a load of fertilizer, cotton, or some similar products for their neighbors, and charge them for same, are such persons required to obtain a chauffeur's license?

In answer to your first question will state that the operators of such trucks are required to obtain chauffeur's license.

Opinions of Attorney General, 1920-22, p. 33,

In answer to your second question will state that my predecessor held that where a person hauls for another than himself for compensation paid by the person for whom he hauls, this is a public use within the meaning of the Act.

Opinions of Attorney General, 1924-26, p. 34.

City of Montgomery, et al., v. Orpheum Taxi Company, 203 Ala. 103.

Opinion of Attorney General, April 5, 1927, to State Tax Commission.

See also p. 220, Compilation Revenue Laws of Alabama, 1929.

It is contemplated, of course, in the enforcement of all law, that the officers charged with the enforcement will exercise sane judgment and look to the spirit of the law.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

The County Health Officer,
Centre, Cherokee County, Alabama.

Dear Sir:

License Peddlers—Peddling by proxy.

Opinion by the Attorney General.

I have your letter of April 29, 1929. In it you state that some months ago you gave a party a permit to peddle without paying for his license; that your attention has been called to the fact that he is operating a truck

and has some two or three more trucks on the road, which are being operated by others for him. I assume that you mean you furnished him with a disability certificate when you say that you gave him a permit to peddle. You request my opinion:

Where a person obtains a peddler's license, can he use that license by hiring others to peddle for him?

In answer will state that a peddler's license is personal and one cannot act by proxy in peddling so far as the license is concerned. Nor can a well man use a sick man's disability as a license to peddle.

Opinions Attorney General 1924-1926, p. 32.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

The Superintendent of Insurance,
CAPITOL.

Insurance—Agents soliciting membership in Alabama Motorists Association which has group insurance for its members not required to pay agents license.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 13, 1929, in which you enclose a letter to you from Mr. Frank E. Spain, Attorney for the Alabama Motorists Association, in which he states to you as follows:

"The Alabama Motorists Association is a non-profit service organization, whose slogan is that it is 'doing for motorists collectively what they cannot do individually.' With a membership of 5,000 motorists in various parts of the State, its functions consist principally of the following:

- (a) Maintaining accurate road information with road maps available for its members;
- (b) Furnishing distress road service to its members;
- (c) Negotiating and obtaining most favorable gasoline and oil prices for its members;
- (d) Assessing for taxation and purchasing license tags for its members;
- (e) Publishing a magazine containing all news and information interesting to its members as motorists;
- (f) Maintaining a travel service by which its members may procure hotel, train and boat reservations.

Affiliated with the American Automobile Association, there are certain services of national scope made available to our members which we could not obtain except by virtue of this affiliation. One of them is the benefit of a contract negotiated by the American Automobile Association with the Lumbermens Mutual Casualty Company whereby we are enabled to procure a group policy upon our members indemnifying them in limited amounts against loss of life, sight or limb. I am enclosing you herewith a copy of the certificate of personal accident insurance which is issued to our members. I call your attention to the provisions of the certificate which provide:

"This is to certify that the Lumbermens Mutual Casualty Company Under a group Policy issued to Alabama Motorists Association has insured the owner of this certificate, whose name appears on the reverse side hereof."

This is a very limited policy but it has proven a very valuable asset to motor clubs in different parts of the country and was not entered upon except upon careful investigation. You may be sure it is a very valuable service when I tell you that two out of three members of the Committee which arranged this coverage were insurance agents, competitors of the Lumbermens Mutual Casualty Company, and obtained no benefits from the contract except such as every other member of the Association obtains.

I said that the Association is 'non-benefit.' Except for the full-time secretary and his staff of full-time clerks and helpers, not one dollar of the revenue of the Association is paid to any other person connected with it. We think the Association is serving a very useful function in Alabama. We claim some credit for having obtained a paved highway from the Tennessee line almost to Florida, having made this one of the primary concerns of the Association for several years. To catalogue the other achievements of the Association would be unbecoming and unnecessary. I mention these facts because I think you will be impressed with the character of the organization, the unselfishness of its purpose, and the non-profit character of its enterprises sheds material light upon the question whether it is amenable to any license statute.

One other fact should be mentioned about this policy. The member does not pay anything for it. It might be said that the \$10.00 membership fee includes it; but this is not the case. I have been a member of the Association for several years. I pay \$10.00 a year now just as I paid \$10.00 a year in the beginning. This is true of thousands of other members. The group policy was purchased by the Association as an enlargement of the benefits and service rendered to them. No increase in the membership fees has resulted."

Upon this statement of facts submitted by Mr. Spain, you request the opinion of the Attorney General on the following questions of law:

1. Whether or not the representative of this Alabama Motorists Association, who delivers a policy with memberships sold in said Association thereby, come under the question of an insurance agent as set

forth in Section No. 443, page 247 of Insurance Laws of Alabama 1928 compilation.

2. If such act does constitute an insurance agent, as defined by said section, must said agent qualify as required in Section 444 et seq. of said law

3. If you find that he is an insurance agent and should qualify as such, he is subject to the penalties in sections 450 and 458 of said Insurance Laws for acting as such agent without a license.

Every matter of the kind submitted by you must be considered according to the facts in each particular case, and the statutes construed with the facts at hand.

The Alabama Motorists Association in providing group insurance to its members, in my opinion is in no sense an insurance agency as defined in paragraph 1, page 34 of the Acts of the Legislature of 1927, and the agents working for the association in soliciting membership are not insurance agents. The officers and agents simply solicit membership in the association, the members receiving the many benefits set out in the statement of facts, and incidentally come under and receive the benefits provided for in a group insurance policy which is taken out and is paid for by the Association to cover all of its members without additional cost. I think the insurance feature of the Association in providing group insurance for its members is a mere incident to the main purposes of the Association.

Having answered your first question in the negative, it is unnecessary to answer questions two and three as set out in your letter.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

Judge of Probate,
Athens, Limestone County, Alabama.

Courts of County Commissioners: may employ Deputy Solicitor to represent County in condemnation proceedings.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 30, 1929, in which you request the opinion of the Attorney General on the following question of law:

Can the Court of County Commissioners of Limestone County employ specially the Deputy County Solicitor of Limestone County as Attorney to represent the County in condemnation suits brought by the County to condemn gravel pits and rights of way for public highways and pay said Deputy Solicitor a reasonable fee for his legal services in representing the County in said suits?

I am of the opinion that the Deputy Solicitor cannot be paid any additional salary or fees for performing the services required of him under Section 5498, Subdivision 8 of the Code of Alabama, 1923. The above quoted Section does not require the Deputy Solicitor to represent the County in condemnation suits brought by the County to condemn gravel pits and rights of way for public highways, this service not being required as a part of his duties as Deputy Solicitor it necessarily follows that the Court of County Commissioners can employ him as an attorney to represent the County in cases to condemn gravel pits and rights of way for public highways, and pay him a reasonable fee for his services, to be determined by the Court of County Commissioners.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Bloodhounds—No authority to use county funds for purchase of for sheriff.

Commissioners Court—Cannot expend county funds for purchase of bloodhounds for sheriff.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 14, 1929, enclosing copy of letter from the Judge of Probate, Abbeville, Henry County, Alabama. You invite my attention to an opinion which you state was rendered in 1904 in which an Assistant Attorney General held that there was no authority of law to purchase bloodhounds for the use of the sheriff of the county in apprehending criminals. You state you are resubmitting the question to me.

You request my opinion:

Is there now any authority of law for the commissioners court of a county to purchase bloodhounds for the use of the sheriff in apprehending criminals?

There is not.

Opinions of Attorney General, 1910-12, p. 190.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

The Judge of Probate,
Girard, Russell County, Alabama.

Marriage licenses—issuance may not be delegated to Justices of the Peace.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 6, 1929. In it you state that in an adjoining county the Probate Judge is signing marriage licenses in blank and permitting the Justices of the Peace to fill in same upon application.

You request my opinion:

Is this practice legal?

In answer will state no.

The statutory duty of the Judge of Probate to issue marriage licenses, though ministerial, is a duty involving official and personal discretion, and it cannot be delegated to one not authorized by statute to exercise it.

Ashley v. State, 109 Ala. 48.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1929.

The Medical Officer in Charge,
U. S. Veteran's Hospital,
Tuskegee, Alabama.

Dear Sir:

Taxation—Excise tax on cigarettes sold on territory under exclusive jurisdiction of the United States Government.

Opinion by the Attorney General.

I have your letter of February 4, 1929, with enclosure, also your letter of March 3, 1929, which refers to your first letter. You state that a canteen is being operated on the United States Government Reservation on which is located the U. S. Veteran's Hospital at Tuskegee, Alabama, and that this canteen is for the sole convenience of the patients who are undergoing treatment there at the expense of the United States Government and in no case is the public permitted to trade at the canteen. You further state that, at this canteen, there are sold, tobacco, cigars and cigarettes to the patients in the Hospital.

Upon this statement of facts you request my opinion:

Must a tax be paid on tobacco, cigars and cigarettes sold at said canteen?

I assume that the canteen is located on a United States Government Reservation, which Reservation, I assume, was ceded to the United States Government under the laws of Alabama, and that in the cession of the territory, the State made no other reservation than that on said territory might be served civil and criminal process of the State. It is upon this assumption only that this opinion is rendered. I have not looked into the question of the cession of the territory.

Assuming, therefore, that this canteen is located on a United States Government Reservation, over which the United States Government has exclusive jurisdiction, with the reservation of the right in the State to serve its civil and criminal process thereon, the excise tax on cigarettes, cigars, etc., sold at said canteen under said circumstances, is not chargeable.

It was never the intent or purpose of the Legislature to require the payment of such a tax by operators of canteens on United States Government Reservations.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 17, 1929.

Superintendent of Education,
Wedowee, Randolph County, Alabama.

Schools—Notice by attendance officer to parent, guardian or person having control of child.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of March 19, 1929. You refer to Sections 305 and 314, School Code, 1927, which sections provide for school attendance and prescribe the duties of attendance officers.

You request my opinion:

When a parent or guardian of a child of school age violates the school attendance law regarding enrollment or attendance, is it necessary that said parent or guardian be given a three days notice before proceeding with prosecution, or can the attendance officer, if he is convinced the violation is wilful, proceed with prosecution without first giving three days notice?

In my opinion the attendance officer can proceed with prosecution without first giving three days notice to the parent or guardian. However, I do not think it advisable for the attendance officer to begin the prosecution

before he gives such three days notice, provided notice can be given promptly, because he might secure information in giving notice which would be useful to him in the prosecution.

Section 305. School Code of 1927, provides for school attendance and also provides the penalty in cases of non-attendance.

Section 314. School Code of 1927, provides that the attendance officer shall investigate all cases of non-enrollment and non-attendance and that where no valid reason for non-enrollment or non-attendance is found, the attendance officer shall give written notice to the parent, guardian, or other person having control of the child, which notice shall require the attendance of said child at the school within three days from date of said notice. Said Section further provides for the institution of a criminal prosecution in the event the investigation discloses that the non-enrollment or non-attendance was **without valid excuse or good reason, and intentional**. The above provision for three days notice was enacted for the purpose of getting the child in school without delay while the provision for prosecution of the parent, guardian or other person having control of the child was enacted for the purpose of punishing for failure to comply with the law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 17, 1929.

Mr. J. W. Renn,
Official Court Reporter,
Fifth Judicial Circuit,
Opelika, Lee County, Alabama.

Reporters—Special Reporters for Circuit Court—Compensation of—
Section 6737, Code of Alabama, 1923, construed.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 7, 1929. In it you invite attention to Section 6737, Code of Alabama, 1923, dealing with the appointment and pay of a special court reporter. You state that the Fifth Judicial Circuit has two Judges and one reporter; that the week beginning April 15th, Court was to be held at Tuskegee and at Dadeville in the Circuit; that your compensation per day for the month of April was \$6.66; that a special reporter was needed at one of these places above mentioned; that you suggested in view of the fact that outside reporters would charge more per day, the special reporter be employed for a sufficient number of days; to raise his compensation to \$7.50 or \$10.00 per day; that you discussed this matter with one of the Judges who stated that he was not willing to approve warrants on that basis as he did not believe the statute authorized it and that he requested you to obtain an opinion from me on the subject.

On the above statement of facts you request my opinion:

Under Section 6737, Code of Alabama, 1923, where a special reporter is employed to serve until the official court reporter can resume his duties, may the compensation of such special reporter cover a longer period of time than the period he actually serves in Court?

In my opinion, where a special reporter is employed under Section 6737, Code of Alabama, 1923, to draw his compensation in the manner therein provided, and from the sources therein contemplated, the per diem compensation cannot be greater than the then existing per diem compensation of the official reporter of the Circuit. Such an arrangement as you suggest would be doing indirectly what the law prohibits doing directly. I therefore, think the Judge was correct.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 17, 1929.

The County Solicitor,
Florence, Lauderdale County, Alabama.

Costs and fees; Justice of the Peace—Justice of the Peace cannot collect costs in cases in which he has no final jurisdiction, and the defendant is discharged.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 13, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not under Section 3650 of the Code of Alabama, 1923, a Justice of the Peace holding a preliminary hearing, binding the defendant over to the grand jury, the case being tried in the Circuit Court and defendant is acquitted, is the Justice of the Peace entitled to deduct his costs in such case out of the **finer and forfeitures collected by him.**

I am of the opinion that Section 3850 of the Code of 1923, allows a Justice of the Peace to deduct his fees from the **finer and forfeitures collected by him**, only in cases where defendants are acquitted in his Court, and does not apply to cases where the defendant has been bound over to the grand jury and acquitted in the Circuit Court. This Section applies only to the collection of costs in cases where the Justice of the Peace has final jurisdiction to acquit or convict and not to cases where he only has authority to bind over to the grand jury.

Costs and fees of a Justice of the Peace in preliminary trials are specially provided for in Section 3753 of the Code of Alabama, 1923, which is as follows:

"Costs and fees in preliminary trials.—Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the state's witnesses before the committing magistrate not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the State; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

This Section relates to costs and fees in preliminary trials wherever a defendant is convicted and sentenced to the penitentiary or hard labor, and there is no authority for a Justice of the Peace to collect costs in cases in which the Justice of the Peace has not final jurisdiction and the defendant is discharged.

Attorney General's Report, 1918-20, p. 523,
Hawkins vs. State, 124 Ala. 102.

Yours truly,
CHARLIE C. McCALL,
Attorney General

May 18, 1929.

The Superintendent of Education,
Ashville, St. Clair County, Alabama.

Education—School trustees—selection of

Acts—Local Acts approved September 26, 1923 (Local Acts, 1923, p. 311) repealed by Alabama School Code, 1927.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 16, 1929. In it you state that under Section 133, School Code, 1927, meetings were held in various communities for the purpose of selecting three trustees for each school in the county, for a term of four years; that since the election of these trustees several vacancies have occurred.

You request my opinion:

Has the St. Clair County Board of Education authority to appoint school trustees to fill unexpired terms, and if it does not have this authority, then by what method should the vacancies be filled?

In answer will state that the law governing the appointment of school trustees for the schools of St. Clair County in Section 133, School Code, 1927. The Local Act approved Sept. 26, 1923, (Local Acts, 1923, p. 311) providing for the selection of three school trustees for each school district

in the county, by the qualified electors of each school district, is, in my judgment, repealed by the Alabama School Code, 1927, and particularly by the Act adopting the Code and Section 133 of said Code.

In my opinion the purpose and intent of the Legislature in adopting said Code was to provide a uniform system for educational matters throughout the State and local laws of this nature inconsistent therewith, unless expressly exempted from repeal, were repealed when said Alabama School Code went into effect. Clearly the provisions of the Local Act approved September 26, 1923, *supra*, is in every way, inconsistent with the provisions of Section 133 of said Code.

Under the provisions of Section 133, *supra*, three school trustees for each school in the county are appointed by the county board of education from six persons nominated for each school in the county by the patrons of the respective schools. The trustees serve for such term as may be fixed by the county board of education. The county superintendent of education has nothing to do with the appointment of school trustees. When a vacancy occurs in a trusteeship the patrons of the school must nominate some one or more persons to fill the vacancy, and upon receipt by the county board of education of the nomination or nominations, it becomes the duty of the county board to select from the nominees a new school trustee for such period of time as the county board deems best. The county board of education cannot appoint as trustee for a school a person who has not been nominated for such place by the patrons of the school.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 18, 1929.

Hon. L. D. James,
Chairman, Board of Education,
Hayneville, Lowndes County, Alabama.

Schools—Member County Board of Education cannot vote by proxy on matter with which he is not familiar.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 11, 1929.

You request my opinion:

Can a member of the County Board of Education who has been sick in bed for a month and who has heard only one side of a question vote by proxy on such question?

In my opinion a member of the County Board of Education cannot vote by proxy.

County Boards of Education exercise broad authority in matters pertaining to schools. They cannot delegate this authority to others.

Section 91, School Code of 1927, provides for meetings of County Boards of Education and said Section provides that the rules generally adopted by deliberative bodies for their government shall be observed by County Boards of Education. This section contains no authority which would allow a member to vote by proxy on any matter. The law contemplates actual personal attendance of the members. They draw pay for actual service and not for actual absence. A vote cast by proxy is an illegal vote.

Yours truly,
CHARLIE C. McCALL
Attorney General.

May 18, 1929.

Hon. Joseph H. James,
Solicitor 4th Judicial Circuit,
Greensboro, Alabama.

Poolroom—operation of—where permitted.
Police Force—Definition of.
Construction of Section 5275, Code of Alabama, 1923.
Opinion of Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of April 27, 1929.

You state that a certain incorporated town in the County of Bibb, State of Alabama, has one police officer, viz: a town marshal, and that said marshal is paid a salary of one hundred dollars per year. Said marshal is allowed fees in some cases. He devotes part of his time to police duties, and engages in private business of his own account part of the time, while holding the office of marshal of said incorporated town.

You further state that the placing of a poolroom in said town is contemplated for the first time in the history of the town, and, therefore, a construction of Section 4275, Code of Alabama, 1923, is desired. Particularly it is desired that a construction be placed upon the words "police force," as the same appear in said Act.

You request my opinion:

Does a city marshal constitute a "police force" within the meaning of Section 4275, Code of Alabama, 1923?

In answer to your inquiry, it is my opinion that the words "police force" as used in Section 4275, Code of Alabama, 1923, have reference to more than one police officer. Section 5275, reads as follows:

"4275. Keeping or operating pool or billiard tables outside incorporated cities or towns.—Any person who keeps, operates, or exhibits a

pool or billiard table on which the public can play, whether for pay or not, outside of an incorporated city or town, having a police force, must, on conviction, be fined not less than fifty nor more than one hundred dollars for each table, and may also be sentenced to hard labor for the county for not less than thirty days nor more than fifty days. But this section shall not apply to clubs conducted by companies which provide welfare work for their employees; nor shall it apply to pool or billiard tables kept or operated at any military camp of the United States or within one-fourth of a mile of such military camp, nor to pool or billiard tables kept and operated at any nitrate plant or on any land acquired and held by the United States."

Had the Legislature intended that a city marshal, alone, constitute a police force, the words "policemen" or "police officer" or "police protection" would have been used.

"A 'police force' is an organization having a controlling mind by which its members may be made to act in concert."

White vs. Manistee County, Mich., 105 Mich. 608, 612, 63 N. W. 653.

"The 'police force' of a city are a **body of men** appointed to preserve its peace and good order."

State ex rel, Bailey vs. Edwards, 106 Pac. 703, 704, 40 Mont. p. 313.

"The term 'police force' when used in a statute or other writing, refers to the body of men appointed to preserve the peace and good order of a city or town, and does not refer to the extensive and undefined, if not undefinable, power usually spoken of as the 'police power' or 'police regulation'. It is true that the word 'police' is sometimes loosely, but inaccurately, used to designate the policemen of a town or city; the body of men appointed to preserve the peace and good order of a town or city; but never, have the words 'police force' been used to designate the police power."

26 S. E. 880, 882, 49, S. C. 332.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 20, 1929.

Hon. C. E. Thomas,
Superintendent of Banks,
CAPITOL.

Section 1½ of Act. No. 376, approved September 6th, 1927, (Acts 1927, p. 440) construed with reference to Section 7101 of Code 1923.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of May 7th, 1929, enclosing letter to you from Mr. J. M. Baldwin of date April 24th is acknowledged.

You wish my opinion upon the following:

Must a person, firm or corporation, availing himself or itself of the privileges granted by Section 1 of Act No. 376, approved September 6, 1927, (Acts 1927, p. 440) conform to the provisions of Section 7101 of the Code 1923?

In reply will say that Section 7101 of the Code 1923, by its terms, applies only to building and loan associations.

Section 1½ of said Act No. 376 provides that: "Every person, firm or corporation availing himself, or itself, of the provisions of this Act shall first conform to and operate under and be subject to all supervisory, regulatory, inspection and taxation laws applicable to building and loan associations doing business in the State of Alabama."

It will be noticed that said Section 1½ does not provide that such person, firm or corporation shall be subject to all laws applicable to building and loan associations; but only to supervisory, regulatory, inspection and taxation laws applicable to building and loan associations.

In my opinion Section 7101 of Code, 1923, is not a supervisory, regulatory, inspection or taxation law within the meaning of said Section 1½. The person, firm or corporation availing himself, or itself, of the privileges conferred by said Section 1 must submit himself, or itself, to the same supervision, regulation, inspection and taxation as is provided for building and loan associations. To make all the laws applicable to building and loan associations applicable to such person, firm or corporation would be to convert such person, firm or corporation into a building and loan association. Such, in my opinion, was not the legislative intent in enacting said Act. No. 376.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 20, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Officers—Chief Clerk in office of Judge of Probate holding office as
County Quarantine Officer.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 29, 1929, attached to which is a letter dated April 24, 1929, from an Assistant Examiner, in which it is stated that the Chief Clerk in the office of the Judge of Probate of Crenshaw County, in 1923, was also County Quarantine Officer of said County.

Upon this statement of facts you request my opinion:

May the Chief Clerk in the office of the Judge of Probate legally be employed as County Quarantine Officer, and receive pay for services in both capacities?

By Section 12, of an Act approved Sept. 29, 1919, (General Acts 1919, p. 196), a County Quarantine Officer was not required to be a licensed physician. Upon the adoption of the Code of Alabama, 1923, by Section 1063 thereof, it was required that the County Quarantine Officer be a licensed physician. Said Section 1063 was amended by an Act approved July 13, 1927, (General Acts, 1927, p. 102), and under the amended Section, the County Quarantine Officer must still be a licensed physician.

The County Quarantine Officer holds a civil office of profit under this State. His duties in part, are defined by statute, and it is provided his compensation shall be paid from public funds.

The Chief Clerk in the office of the Judge of Probate is employed at the expense of the Probate Judge. (Sub-section 6, Section 9590, Code of Alabama, 1923). He draws no compensation from public funds. His duties are defined by statute. (Section 9592, Code of Alabama, 1923). He is a public officer for certain purposes, but he does not hold a civil office of **profit** under this State **within the meaning** of Section 280 of the Constitution, for that his compensation is not payable from public funds. He is not a **county officer within the meaning** of Section 2658, Code of Alabama, 1923.

(Opinion Attorney General, April 24, 1929, to Judge of Probate, Jefferson County, Ala.)

He is a public officer within the meaning of the statute which forbids a public officer from purchasing, dealing or trafficking in any claims payable out of the County Treasury, or out of the fine and forfeiture fund of the County.

(Scruggs v. State, 111 Ala. p. 60)

For a full discussion of the meaning of the words "public officer" see Gerald v. Walker, 201 Ala. 502, in which it is stated:

"Every case must of necessity be determined by consideration of the particular facts and circumstances involved."

(See also *Harrington v. State*, 76 So. 422.)

Here, however, it is unnecessary for us to consider further the question of whether or not a Chief Clerk in the office of the Judge of Probate of the County is a public officer. Having determined that he does not hold a civil office of profit under this State, further consideration of the provisions of Section 280, Constitution of Alabama, 1901, is unnecessary.

An examination of the statutes defining the duties of a County Quarantine Officer and the statutes defining the duties of the Chief Clerk in the office of the Judge of Probate leads me to conclude that the holding of both offices would not be violative of Section 43, Constitution of Alabama, 1901. There appears to be no statute prohibiting the Chief Clerk from being County Quarantine Officer. There is no constitutional provision against it.

I am, therefore, of the opinion that, if the Chief Clerk in the office of the Judge of Probate meets the statutory qualifications for a County Quarantine Officer, there is no provision of law prohibiting him from being thus employed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 20, 1929.

Superintendent of Insurance,
CAPITOL.

Dear Sir:

1. Insurance—Premium tax—foreign companies.
2. Taxation—Tax on Foreign Insurance Companies—To be paid on gross premiums less returned premiums.

Opinion by Assistant Attorney General Smith.

I have your letter of March 8th, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not foreign life insurance companies doing business in this State may include dividends in the item of return premiums for which they took credit in paying their premium tax due the State under Section 3 of Subdivision (b) of an Act of the legislature of Alabama, 1927, page 149.

The above section of the statute relates solely to a tax on **gross premiums** received by the Insurance Companies for business done in Alabama, **less returned premiums**, whether the same are actually received by said Company in this State or elsewhere, there is no mention made in the statute of dividends.

In order to properly construe and arrive at the intention of the legislature, it is necessary to ascertain the legal definition of the words "premium" and "return premium" as used in the Statute. The definition of "premium," as used in law and the business of insurance, is "the consideration paid for a contract of insurance" whether called an initiation fee, an admission fee, or any other name, this consideration is none the less strictly a premium.

Northwestern Life Association vs. Staut, 32 Ill. App. 31-28.

Having thus arrived at the legal definition of the word premium as used in the business of insurance, I am of the opinion that the legislature used this word knowing its legal meaning and the construction given to it by the Courts. Therefore, in ascertaining the amount of tax to be paid by insurance companies on their gross premiums there should be included only the consideration paid for the contract of insurance by the insured. Whether it be called **initiation fee, admission fee or any other name**, it must always be the amount paid in consideration for the **contract of insurance**.

Less, "returned premiums" means the premiums as above defined which are returned to the insured on his contract of insurance. Therefore this is the only item that an insurance company can deduct in paying their tax under the above referred to Act of the Legislature. In making deduction in the collection of this tax it should always be born in mind that "return premium", means **a part of the considerations paid by a policy holder to the insurance company for its contract of insurance, whether called an initiation fee, an admission fee, or called a dividend or any other name, and which part is returned to the policy holder under a contract with the insurance company.**

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 20, 1929.

The Tax Assessor,
Fayette, Fayette County, Alabama.

Licenses—Motor vehicles—ad valorem tax—where vehicles used for part of year exclusively in transporting school children.

Taxation—Motor Vehicles.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 16, 1929, also your letter of March 25, 1929, which refers to the first one. You state that a truck was purchased in September, 1926, and used immediately for the purpose of transporting children to and from school in Fayette County; that in the following April, the owner of the truck paid for one-half year's license and obtained a tag for said truck; that he then devoted the truck to his own use about his farm; that the following fall and winter he used the truck again exclusively in transporting chil-

dren to and from school; that in April following, he purchased a license for a half year and obtained a tag and again devoted the truck to his personal use; that in the fall of 1928, he again used the truck in transporting children to and from school; that on April 1, 1929, he desires to purchase an automobile license for one-half year, with the intention of carrying out the same plan.

Upon this statement of facts you request my opinion:

For what period of time is said party due ad valorem tax on said truck?

In answer will state that the first payment for ad valorem tax became due when he applied for a license in April, 1928, and for each year afterwards when he applied for license.

You will note that any exemption granted in the matter is as to the privilege license and not as to ad valorem tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 21, 1929.

The Board of Revenue,
Hayneville, Lowndes County, Alabama.

Dear Sir:

High School—Appropriation by commissioners' court or board of revenue.

Opinion by Assistant Attorney General Haynes.

I have your letter of April 24, 1929, in which you state that the Board of Revenue of your County desires to make an appropriation for your county high school, and you request my opinion:

Is it necessary for a claim to be filed for this appropriation as is provided for under Section 225, Code of Alabama, 1923?

It is my opinion that no claim for this appropriation has to be filed with the Board of Revenue as provided for under Section 225, Code of Alabama, 1923. This Section has reference to and is applicable to all claims for debts due by the county, and not to appropriations which are allowed by law to be made by such boards. However, by proper resolution spread upon its minutes the Board should make the appropriation.

State ex rel City of Mobile vs. the Board of Railroad Commission, Mobile County, 180 Ala. 541.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 22, 1929.

The Clerk of the Circuit Court,
Decatur, Morgan County, Alabama.

Dear Sir:

Fees—Solicitors—Motor Vehicles—Licenses.

Solicitor's fee—Driving a motor vehicle without a license.

Opinion by the Attorney General.

I have your letter of April 23, 1929. You state that one was convicted of the offense of driving a motor vehicle upon the public highways of this State without having procured a license tag.

You request my opinion:

What is the proper solicitor's fee for conviction for driving a motor vehicle on the public highways of the State without having first procured a license to operate said vehicle?

In my opinion the proper solicitor's fee is \$30.00.

Opinion Attorney General, Jan. 4, 1929, to Circuit Clerk, Macon County.

Opinion Sept. 13, 1928, to Circuit Clerk, Tallapoosa County.

The Revenue Laws of the State require a privilege license to operate an automobile or other motor vehicle upon the public highways of the State.

Section 5424, Code of Alabama, 1923, makes it a misdemeanor for one to do any act for which a license is required without having first procured the license. Said Section reads as follows:

"5424. Engaging in or carrying on business without license.—Any person, firm or corporation who shall engage in or carry on any business or do any act for which a license is required by law, without having first paid for and taken out a license therefor, in the manner provided by law, shall, on conviction, be fined not less than the amounts of all licenses required of him, and if convicted for refusing to take out the license shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than one hundred dollars in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and, when collected, two-thirds shall be paid to the state, and one-third to the county."

The above quoted Section of the Code is broader than Section 367, Act approved Sept. 15, 1919, (General Acts 1919, p. 443), which was limited in its operation to that Act. Therefore the above mentioned Code Section 5424, should be followed.

It is provided that the solicitor's fee on conviction for a violation of the Revenue Laws of the State shall be thirty dollars (\$30.00).

Section 3738, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 22, 1929.

Secretary, Alabama Real Estate Commission,
CAPITOL.

Dear Sir:

Real Estate Commission:—without power to try and assess fines for violation of law.

Opinion by Assistant Attorney General Haynes.

I have your letter of April 27, 1929, in which you state that you are Secretary of the Real Estate Commission and as such you request my opinion:

Under the Alabama Real Estate Law, Acts approved Aug. 27, 1927, General Acts 1927, p. 345, Section 12, may the Alabama Real Estate Commission exercise the right to assess a fine and collect same against parties properly summoned before it for the violation of the law?

It cannot. There is no such judicial power conferred by this Act on such Commission. All violations under this Act must as in other cases, be tried by a court of competent jurisdiction.

Section 12 of the Act, *supra*, states among other things:

"Any court of competent jurisdiction shall have full power to try any violation of this Act, and upon conviction the court may at its discretion revoke the license of the person, co-partnership, association or corporation so convicted."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 22, 1929.

The County Treasurer,
Hamilton, Marion County, Ala.

Dear Sir:

Jury Commission—

Witness—before jury commission—not entitled to payment for attendance.

Opinion by the Attorney General.

I have your letter of May 17, in which you invite my attention to Section 8606, Code of Alabama, 1923, authorizing a jury commission to summon and cause to attend before it any person residing in the county and examine him under oath, touching the qualifications of prospective jurors.

You request my opinion:

Is there any provision of law for paying these witnesses upon proper certificate of their attendance being presented to me by the jury commission?

In answer will state there is not.

While the above cited Section of the Code authorizes a jury commission to summon and cause attendance of such persons before it for the purpose therein mentioned, and authorizes the jury commission to place witnesses under oath to testify to the matters therein mentioned, the statute is silent as to the payment of fees to witnesses so attending. The law of costs and fees must be held to be penal and no fee must be demanded or received except in cases absolutely authorized by law.

Torbert v. Hale County, 131 Ala. 143-145;
Troup v. Morgan County, 109 Ala. 162-165;
Opinions Attorney General, 1910-12, p. 107.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 22, 1929.

The Clerk of the Circuit Court,
Hamilton, Marion County, Alabama.

Dear Sir:

Fees—State Law Enforcement Officers—Sections 3741 and 4654,
Code of Ala., 1923.

Opinion by Assistant Attorney General Rayburn.

I have your letter of June 16, 1928.

You request my opinion:

Is a State Law Enforcement Officer legally entitled to the fees provided for in Section 3741 and 4654, Code of Alabama, 1923?

In answer to your inquiry, it is opinion that the fees named in Section 3741, Code of Alabama, 1923, can legally be paid only to the sheriff. The sheriff is not entitled to said fees if matters therein mentioned are performed by a State Law Enforcement Officer. In such a case no one is entitled to said fees.

It is my opinion that state law enforcement officers are legally entitled to the fees enumerated in Section 4654, Code of Alabama, 1923. A law enforcement officer is an "officer" within the purview and scope of Section 4654, Code of Alabama, if he is appointed by the Governor.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Baptist State Executive Board not exempt from license tax for operating motor vehicle on public highways of State.

Judge of Probate issuing tag to Baptist State Executive Board for operating motor vehicle on public highways of State, liable for license tax due and paid as evidenced by said tag.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of May 17, 1929. You wish my opinion in answer to the following question:

Is a motor vehicle the property of the Baptist State Executive Board, exempted from the provisions of law requiring the taking out of a license for operating a motor vehicle on the public highways of the State?

In reply will say that there is no exemption provided by law for such a case. A license tax is required for the privilege of operating certain motor vehicles upon the public highways of the State by Act No. 280, approved Sept. 13, 1923, (Acts 1923, p. 284, et seq), and for the privilege of operating motor trucks by Act. No. 163, approved July 22, 1927, (General Acts, 1927, p. 157).

Privilege taxes and exemptions therefrom are governed entirely by statute and there is no provision of any statute of the State of Alabama which could be twisted or contorted into such a meaning.

There is, in my opinion, no shadow of such a provision in the law.

You next ask, if a tag has been issued to such Executive Board by the Probate Judge without his having collected the amount required by law, is not the Probate Judge liable on his official bond to the State for the amount required by law to be paid for license before issuing such tag?

In reply will say Section 20 of Act No. 290, approved Sept. 13, 1923, (General Acts 1923, p. 290) provides:

"The payment of registration fee or license tax on motor vehicles shall be evidenced by the delivery to the party paying the same of a numbered license tag which shall be placed on the rear of the automobile or motor vehicle."

By Section 19 of said Act of 1923, it is provided:

"The license tag shall be evidence of the payment of the license and ad valorem tax due as provided under this Act."

It is my opinion that when a license tax for operating a motor vehicle on the public roads of the State is due, and the Judge of Probate issues a tag therefor, such tag is acknowledgment by him, so far as the State, County or City is concerned, that he has received the money required for the issuance of such tag, and that he is chargeable therewith, and his bond is liable therefor. Of course, it is evidence of having received the money only in cases where a license tax is due. Where a tag is required to be issued without the payment of the license tax, as in the case of motor vehicles owned and used by State, County or City, such tag is not evidence of the payment of the license tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Dear Sir:

Licenses—Pawnbrokers—License as such does not permit sale of pistols.

Opinion by the Attorney General.

I have your letter of May 13, 1929. In it you state that a number of pawnbrokers in Alabama have been cited to take out a license to sell pistols but that they claim they are exempt on the ground that they have taken out a pawnbrokers' license.

You request my opinion:

Is a pawnbroker required to pay for a license to sell pistols where such pistols are taken in as pledges and sold by said pawnbroker?

In answer will state that a pawnbroker's license does not carry with it authority for a pawnbroker to sell pistols in any way. A pawnbroker who desires to sell anything taken in pawn must take out a license as an auctioneer under Schedule 2 of Section 361 of an Act approved September 15, 1919, (General Acts 1919, page 396).

Opinions Attorney General 1912-14, p. 131.

I invite your attention to Sections 9408-9413 of Chapter 329, Code of Alabama, 1923. By Section 9411 it is provided that all sales of pledges made by pawnbrokers must be at public auction. Section 5134, Code of Alabama, 1923, makes it a misdemeanor for a pawnbroker to fail to comply with any of the provisions of Chapter 329 of the Code, *supra*, of which Section 9411 is a part. There is a typographical error in said Section 5134 in that it refers to Chapter 328 of the Code when it should refer to Chapter 329 since the latter chapter is the only one referring to pawnbrokers and pawns.

In passing I invite your attention to the footnote under Section 9413, Code of Alabama, 1923, referring to the case of *Morningstar vs. State*, 135 Ala. 66, in which it was held that one who has taken out and paid for a state and county license as a pawnbroker has authority to sell pistols which have been lawfully pawned to him, and in making such sale he is not carrying on the business of a dealer in pistols in such sort as makes it necessary for him to take out a license as required by the statute. The foregoing decision was rendered by the Supreme Court of Alabama at the November term of 1902. At that time a pawnbroker was required to take out a license under the following Schedule of the General Acts of 1900-1901:

"For each pawnbroker, Seventy-Five Dollars."

Evidently in view of the decision of the Supreme Court in the foregoing case, the Legislature, in 1903, rewrote the pawnbroker's license schedule as follows:

"For each pawnbroker, One Hundred and Fifty Dollars; but this shall not be construed to allow the sale of pistols, unless an additional license of Fifty Dollars is paid."

Clearly the last clause of the Schedule last above quoted was written to cure the defect existing in the law as shown by the decision in *Morningstar vs. State*.

Schedule 78 of Section 361 of an Act approved September 15, 1919, (General Acts, 1919, p. 425) is the present license schedule for pawnbrokers, and is as follows:

"For each pawnbroker, Two Hundred and Fifty Dollars; but this shall not be construed to allow the sale of pistols unless an additional license is paid as required by this act."

Therefore, you will observe that the proviso has been carried forward since the Act of 1903, *supra*.

There is only one way by which a pawnbroker may legally sell pledges, and that way is by public auction as provided by Section 9411, Code of Alabama, 1923, as heretofore stated. If a pawnbroker wishes to engage in the sale of pistols **not pledged**, then he must have a license to sell such pistols. If a pawnbroker sells pistols **taken as pledges**, he must obtain an **auctioneer's** license **or** must sell them through a licensed auctioneer.

"While it is true that they (pawnbrokers) are required to dispose of them (pledges) at public outcry, this * * * does not relieve them of the liability for a tax as auctioneers, for the reason that they may be disposed of through the agency of legally licensed auctioneers, and the public policy declared in the statute is to prevent the disposition of such pledge in any other than the most public manner. If the pawnbroker himself should conduct the sale at public outcry he would not be acting in his capacity as a pawnbroker, but would be acting as an auctioneer, and in my opinion would be liable for the license as such."

(Opinions Attorney General, 1912-14, *supra*)

See also Opinion June 13, 1928, to Judge of Probate, Jefferson County which is modified to conform to this opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Fees and costs: Circuit Clerk entitled to fee of fifty cents for entering recognizance in criminal cases.

Opinion by Assistant Attorney General Smith:

Dear Sir:

I have your letter of May 20, 1929, in which you request the opinion of the Attorney General on the following questions of law:

1. What is the legal meaning of the word recognizance?
2. Is a confession of judgment for fine and costs the same thing as a recognizance?
3. In the event you hold that a confession of judgment is the same thing as a recognizance, would the circuit clerk be entitled to a fee of fifty cents for entering the recognizance or would the clerk be entitled to a fee of fifty cents for each person to the confession of judgment for fine and costs?

In answer to your first question I quote you the recognized legal definition of the word recognizance. A "recognizance" is where the prisoner and his recognizers appear before the court or justice and acknowledge themselves to be indebted to the State in a certain sum, and certain conditions, which is entered on the records and thereby becomes a part of it. "It differs from a bail bond merely in the nature of the obligations created, the former being an acknowledgment of record of an existing debt, while the latter, is attested by the signature and seal of the obligor, creates a **new obligation.**"

Words and Phrases, Vol. 4, p. 209,
State v. Dorr, 115 Am. State Rep. 915.

In answer to your second question I am of the opinion that a confession of judgment and a recognizance is one and the same thing.

In answer to your third question I am of the opinion that the Circuit Clerk is entitled only to a fee of fifty cents for entering recognizance as provided in Section 3739 of the Code of Alabama, 1923, no matter how many obligors there are to the recognizance. The statute provides the one fee of fifty cents for the entire transaction and is not based on the number of obligors.

Statutes giving costs and fees must be strictly construed and not extended beyond their letter.

Hawkins v. State, 124 Ala. 102.

An officer claiming fees or costs is bound to point to a definite law authorizing it.

N. A. R. Co. v. Towery, 57 So. Rept. 260.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Bail—liability of Sheriff where taken contrary to court's order.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 8, 1928, in which you present the following facts: On March 23, 1925, Bertha Cole, a woman, was convicted of murder in Lauderdale County, Alabama, and sentenced to the penitentiary for a term of years and that the case was appealed. The judge's bench note entries show she was ordered released on bond pending appeal, and sentence was suspended, and the bond was fixed at \$5000.00. The case was affirmed by the Court of Appeals on Oct. 26, 1926, and there was a certificate of recall on November 8, 1926, and on November 23, 1926, application for rehearing was denied. The Sheriff of the County, instead of taking the bond which he was ordered to take as shown by the minutes of the Circuit Court and which was to be approved by the Sheriff in the sum of \$5000.00, took a bond in the sum of \$3000.00. This bond was approved by C. C. Morrison, who was then Sheriff of Lauderdale County. Said bond was not marked forfeited under the law by the Sheriff until the cumbency of W. L. Stutts, Sheriff of Lauderdale County on April 12, 1927. After it was declared forfeited by the Sheriff on the date last mentioned he then took steps to bring it in the Circuit Court of Lauderdale County, and went through some proceeding to have the bond forfeited in that Court, and it appears that such was done by a judgment of the Court on Sept. 15, 1927. On October 13, 1927, the Clerk issued an execution against the defendant and bail. The first return on this execution was on June 19, 1928, by the present Sheriff.

You request my opinion:

1. Since the only condition upon which the Sheriff could release the defendant when the appeal bond was taken was on the defendant entering into bond of \$5,000.00 and since the Sheriff did not require a bond of \$5,000.00, and since the defendant did not surrender herself after the case was affirmed by the Court of Appeals, is not the Sheriff liable to Lauderdale County in the sum of \$5,000.00, the amount of the bond required to be taken?

2. Since the Sheriff instead of taking the \$5,000.00 bond, took a \$3,000.00 bond was he not required, by the bond that he did take, to see to it that each one of the bail was a resident householder and freeholder of the State and that each was worth the amount expressed in the undertaking, or if he took a bond with more than two persons as sureties to justify as bail any amount less than expressed in the undertaking, was not the whole bail to be required to be twice the amount of the bail mentioned?

3. If he approved bail that did not meet these conditions, is he not liable on his official bond for failing to take the bond required by law?

4. If, on the other hand, the Sheriff is required to put the matter before the Circuit Clerk and the Circuit Clerk is required to enter it as a case upon the docket to have gone to a final judgment, shown as of date Sept. 15, 1927, and execution was issued, as shown on the 13th of October, 1927, by the Clerk, and the Sheriff failing to make any return on this execution until June 19, 1928, more than eight months from the time the execution was placed in his hands, is the present Sheriff not liable on his official bond for failing to make the money on the execution, or to return it within the time required by law?

Answering your first and second inquiries I call your attention to Section 3364, Code of Alabama, 1923, which provides for the fixing of bail in all felony cases where indictment has been returned and is as follows:

"How bail for felony fixed; taken by sheriff.—When a bill of indictment is filed in court charging the defendant with a bailable felony, and the defendant fails to give bail in open court, the judge of the court must forthwith indorse on such indictment the amount of bail to be required of the defendant; and, when an application for bail is made to any judge, such judge may fix the amount of bail; and the sheriff has authority, and it is his duty, to discharge such defendant on his giving bail as required. This section shall not have effect to prevent application for bail, or for reduction of bail, in any other manner provided by law."

You will observe that the judge of the court is the only person invested with the power to fix bail in felony cases after indictment and this must be endorsed on said indictment and it is my opinion the Sheriff is without authority to increase or diminish the amount of the bail fixed by the judge of the court and should he take bail for a less amount than set by the judge and the party fails to appear, then in my opinion the Sheriff would be guilty of an escape under Section 4007 of the Code of Alabama, 1923, which is as follows:

"Negligent escape—Any officer or person who has the legal custody of any person charged with or convicted of an indictable offense, and who through negligence suffers such person to escape, must, on conviction, be fined not less than two hundred nor more than one thousand dollars."

It is also my opinion that the Sheriff would be civilly liable to the County of Lauderdale and that he and his bondsmen could be made to answer in damages for the amount of bail required by the judge in case it can be shown that the bond he did take was at the time of the taking insolvent.

Sections 3375 and 3376, Code of Alabama, 1923, fix the qualifications of bail. Section 3375 is as follows:

"Bail not in open court; forms and requisites of.—When not taken in open court, the undertaking of bail must be in writing, signed by the defendant, and at least two sufficient sureties, and approved by the magistrate or officer taking the same."

You will note that the above section requires that when a bond is not taken in open court the undertaking of bail must be in writing and signed by the defendant and at least two sufficient sureties.

Section 3376, *supra*, fixes the qualifications of bail and is as follows:

"Qualifications of bail.—The qualifications of bail are, that each must be a resident of this state, and a householder and a freeholder therein, and that each must be worth, exclusive of property exempt from execution, the amount expressed in the undertaking; but the court, magistrate, or officer, in taking bail, may allow more than two persons to justify severally as bail in amounts less than that expressed in the undertaking, provided the whole be equivalent to two sufficient bail."

You will note that for a person to become surety on such bail he must (1) be a resident of the State, and a householder and freeholder therein, and (2) he must be worth, exclusive of property exempt from execution, the amount expressed in the undertaking. Construing this in the plain language of the statute it simply means that the surety on the undertaking of bond must be worth double the amount fixed.

If the party in this case failed to appear within fifteen days after her case was affirmed or dismissed by the Court of Appeals then it became the duty of the Sheriff under Section 3245, Code of Alabama, 1923, to endorse the bond forfeited and a writ of arrest should have been issued by the Clerk.

When any undertaking of bail in cases of this character is forfeited by the failure of the defendant to surrender himself to the Sheriff or appear and answer the charge the same proceeding must be had as is had on forfeiture of other undertakings of bail in the Circuit Court which means that the case must be docketed against the defendant and bail. Citations must be issued by the Clerk and served by the Sheriff on the individual securities commanding them to appear before said Court and show cause, if any, why said forfeiture should not be made final.

Answering your fourth inquiry, it is my opinion that the present Sheriff of Lauderdale County is liable on his bond for failure to return the execution within ninety days after its issuance, the time fixed by Section 7814, Code of Alabama, 1923. This statute fixes this as the limit at which the Sheriff can make his return and if by his negligence the bond should become insolvent for any reason then he would be liable.

If there is any reason why the writ is not executed it is the duty of the Sheriff under Section 7815, Code of Alabama, 1923, to set out in full in making his return, but he must make return regardless of any excuse. His failure to make the amount of the bond while the execution is in his hands may make him liable upon his official bond.

Newcomb Bros. Wall Paper Co. v. Wiggins, 201 Ala. 551.

Wilson v. Brown, 58 Ala. 62, 35 Cyc. 1625, 35 Cyc. 1673.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Cost and Fees: When no fine assessed there can be no sentence for cost. No execution to issue: Such cost is not a charge against fine and forfeiture fund.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of May 13, 1929, enclosing letter from Mr. W. L. Lee, Jr., Examiner of Accounts, in which are submitted for my opinion the following propositions:

1. Can a presiding judge legally sentence a defendant to hard labor for costs where an indictment is returned by the Grand Jury and the verdict of the jury is as follows: "We the Jury find the defendant guilty of petit larceny and sentence him to thirty days in jail."
2. In the event the presiding judge cannot sentence for costs in above case can execution issue for costs, and if returned "no property found," are the fees of the officers of the Court a charge against the fine and forfeiture fund?
3. The presiding judge having failed to sentence for costs, and the defendant being now at liberty, can said defendant be again brought into court, and sentenced for costs, and if not, is any officer liable for the release of such defendant?
4. Where there is no judgment for costs and consequently no execution issued, would there be any authority to make claim for costs on the part of the officers against the fine and forfeiture fund?

Answering your first question I am of opinion that while the verdict of the jury in this instance is irregular, it is not void and that part of the verdict which sentenced the defendant to thirty days in jail is a mere surplusage.

See 39 So. 573.

The presiding judge in this instance could not sentence a defendant to hard labor for costs, no fine having been assessed.

See *Hollis v. the State*, 123 Ala. 74.

Answering your second question, I am of opinion that there being no fine assessed, and no judgment for costs, no execution could legally issue for costs, and in this instance the fees of officers of the court would not constitute a charge against the fine and forfeiture fund of the county.

See Opinions Attorney General, Book 7, p. 203 (Office Edition).

Answering your third question, I am of the opinion that under the circumstances mentioned this defendant could not be brought again into court, and sentenced for costs and no officer would be liable for releasing him when his sentence imposed by the court had expired.

See Acts 1927, p. 45.

Answering your fourth question, I am of the opinion that under the circumstances mentioned, the officers of the court would not have a valid claim against the fine and forfeiture fund of the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 24, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Witness fees: Witness fees should not be charged against a defendant in a criminal cause unless attendance has been proved.

Witnesses: In criminal cases must prove attendance upon conclusion of cause.

Sheriffs: Return on subpoena showing mileage of witness not necessary.

Witness fees: Witness fees unclaimed where attendance proved belong to county after six years.

State witnesses: May claim per diem in more than one case a day where required to attend upon trial of more than one case, or the case in which he has elected to prove attendance.

Subpoenas: "Subpoenaed" does not contemplate service, so as to authorize charge of attendance to defendant. However, where witness proves attendance clerk must charge same if he has issued subpoena for witness.

Fees: Clerk not entitled to fees for subpoenas issued in cause which is continued where same witnesses were subpoenaed.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of May 8th in which you submit a request for an opinion from Hon. W. L. Lee, Jr., an Examiner of Accounts. Mr. Lee states that he desires information concerning witnesses' fees and compensation in criminal cases.

Mr. Lee inquired as follows:

1. Should all fees and compensation of witnesses subpoenaed on the part of the State before the grand jury and the court of final jurisdiction be taxed against the defendant whether or not attendance is proved or claimed?
2. When must attendance be proved for the witness to receive his fees and compensation?
3. Is it necessary that a Sheriff's return on a subpoena show the mileage to and from the place of residence of the witness?
4. If witness fees are charged to the defendant and not claimed by the witness should the money become the property of the county or should the same be returned to the defendant?
5. May a State's witness claim and receive per diem in more than one case for the same day?
6. Does the word "subpoena" contemplate actual service by the Sheriff of the subpoena on the witness?
7. If a case is continued one or more times should the clerk charge fees for all witnesses subpoenaed originally and at each subsequent term for each term for which the case is set for trial?

In answer to your first question I am of the opinion that witness fees should not be charged against the defendant in a criminal cause unless attendance has been proved. This of course contemplates the fee due the witness, that is, per diem and mileage. A defendant does not become liable for mileage and per diem of a witness until the same is proved, for, to all intents and purposes there has been no attendance.

Answering your second inquiry I am of the opinion in criminal cases it is necessary to support a witness' claim for mileage and per diem that a witness proves his attendance and claims his mileage at the determination of the cause and before a judgment for cost is rendered by way of sentence against the defendant.

Answering your third inquiry I am of the opinion that it is not necessary that the Sheriff's return on the subpoena showed the mileage from the place of residence of the witness. The clerk should not charge the mileage of a witness until his attendance is proved and when the attendance is proved the necessity for the return showing mileage on the subpoena is obviated.

Answering your fourth inquiry the witness fees charged to the defendant, attendance having been proved, and not claimed within six years, become property of the county.

Sections 7244 and 7245, Code of Alabama, 1923.

Of course, should inadvertently a clerk erroneously tax a defendant with witness fees where the witness has failed to prove his attendance this money should be refunded to the defendant and the clerk would not be liable for such refund.

In answer to your fifth inquiry I am of the opinion that a State witness in a criminal case having been summoned for more than one case set for the same day may first elect in which case he will claim his fees, and in the event that case is disposed of and he is required to remain to attend other cases in which he is summoned to attend as a witness he may also prove his attendance in the case he is required to remain to attend and after having elected to prove his attendance in the second case and such case is disposed of he is still required to attend a third case after the disposition of the first two cases of his election he may also prove attendance in the third case and under such circumstances is entitled to per diem in each case.

Section 3770, Code of Alabama, 1923.

Opinion of Attorney General (Office Edition), Vol. 3, p. 208, to Hon. W. H. Shaw, Deputy Solicitor, Tuscumbia, Alabama, October 3, 1927.

Opinion of Attorney General (Office Edition), Vol. 1, p. 64, to Hon. M. R. Sowell, Monroeville, Ala., of date December 10, 1926.

In answer to your sixth inquiry I am of the opinion that the word "subpoena" means that a subpoena has been issued by the clerk for a witness. This does not necessarily mean that the subpoena has been served upon the witness nor does it justify the clerk in charging the defendant with the witness' attendance. However, if the witness attends after the subpoena has been issued for him and claims his attendance such fee should be taxed against the defendant. The witness having proved his attendance to the clerk it is not necessary that the clerk refer to the Sheriff's return of the subpoena to determine whether or not the witness fees should be taxed and collected.

In answer to your seventh inquiry, if a case is continued one or more times the clerk and the Sheriff are not entitled to fees for issuing and serving subpoenas respectively for the same witnesses. Section 5619 provides that it shall not be necessary to resubpoena witnesses at subsequent times where a case has been continued. Section 5621, Code of Alabama, 1923, provides to the like effect.

O'Rear, Treasurer v. Long, 186 Ala. 597.

I am of the opinion, however, that a witness' fees for attendance which he proves should be taxed each time he is forced to attend whether it is a continued case or not.

I have taken note of Section 7235, Code of Alabama, 1923, which provides that a witness must prove his attendance within five days after the adjournment of the session of the court at which he attended but in my opinion this section refers only to witnesses in civil cases.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 25, 1929.

The Chairman,
State Tax Commission,
State Capitol.

Taxes—Gas oil subject to excise tax on gasoline.
Opinion by the Attorney General.

Dear Sir:

I have your letter of April 3, 1929. In it you state that by a recent investigation you have found that products commercially known as distillates and gas oil are being used as a substitute for gasoline in internal combustion engines. You invite my attention to an Act of 1923 as amended by an Act of 1927, and to an Act of 1927, both of which deal with the excise tax on gasoline or substitutes therefor. You request my opinion:

Does the product commonly known as gas oil come within the definition of a device or substitute for gasoline under the gasoline excise tax act?

In answer will state that it does. "Gas oil" is a device or substitute for gasoline and is a product designed primarily for use in internal combustion engines and not for lighting and heating purposes. The three classes of products exempt from the excise tax are crude oil, kerosene oil and those types of fuel oils designed primarily for lighting and heating purposes.

I cannot answer your question as to distillates unless you advise me what particular distillate you have in mind.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 28, 1929.

The Clerk of the Circuit Court,
Florence, Lauderdale County, Alabama.

Officers—State Law Enforcement Officers—appointed only by Governor—person appointed State Law Enforcement Officer by member of that department is neither a de facto nor a de jure officer and does not possess the color of office and is not entitled to any fees.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 10, 1929. Also your previous letter of April 13, 1929 (Request No. 1089).

You state that several cases have been filed in the county court of your county for violation of the State traffic laws and that most of these cases have been disposed of by defendants paying the costs and the cases being

nolle prossed. It appears that one W. A. Crowell, who styles himself a "state law enforcement officer," is claiming the fees for making arrests, approving bonds, and serving subpoenas in these and similar cases on the same basis as a sheriff. You state that Mr. Crowell possesses a card, No. 155, signed by Hon. W. K. McAdory, whereby Mr. McAdory purports to appoint said Crowell a "Deputy Law Enforcement Officer" in the "Law Enforcement Department" of the State. You further state that Mr. Crowell was never appointed a law enforcement officer by the Governor of the State, but that Hon. W. K. McAdory, Chief Law Enforcement Officer of the Law Enforcement force made the appointment of Mr. Crowell in the manner stated by you.

You request my opinion:

Is Mr. Crowell entitled to said fees under the facts above stated?

In answer will state that he is not.

The power to appoint to office involves the exercise of discretion and cannot be delegated to a subordinate, except where the law specifically authorizes it. The Governor of the State cannot delegate to Mr. McAdory, or anyone else, the power to appoint a state law enforcement officer. The card which Mr. Crowell holds and by which he purports to act as a state law enforcement officer, is a nullity. Under it he is neither a *de facto* nor a *de jure* officer, and he does not possess even the color of office. When he attempts to exercise any official function with the card as his only authority, he is guilty of impersonating an officer.

For the reasons set forth above, the party mentioned is entitled to no fees of any sort.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 28, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

County Treasurer: Duty of County Commissioners to designate County Treasurer and County Depository: What minutes of County Commissioners should show: Term of office of County Treasurer and County Depositories: Liability of officers: Construing Articles I and II of Chapter 17 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of May 14, 1929, in which you invite my attention to Chapter 17, Articles I and II of the Code of Alabama, 1923, relating to the powers and duties of the county treasurer, and to county depositories in lieu

of county treasurers, and particularly to Sections 312, 314 and 316 which constitute a part of Article II, *supra*.

You further propound the following questions, and request my opinion:

(1) Will you advise particularly whether or not the Court of County Commissioners has any authority granted by law to designate under Section 322 of the Code "some individual who may act as Treasurer of such County under such terms or conditions as may be fixed by said Court of County Commissioners or Board of Revenue" until such Court of County Commissioners or Board of Revenue has invited bids from incorporated State or National Banks in the county to act as County Depository, and until such Court of County Commissioners or Board of Revenue has been unable to designate any Depository for County funds in the County "by reason of their inability to secure from any bank within its limits terms for the handling of the county funds as provided in this article, satisfactory to such boards of revenue or courts of county commissioners?"

(2) Where the minutes of a Commissioners Court fail to show that any bids had been invited from such banks, and that no bids had been received, would not the designation of a person to act as Treasurer be without authority of law, and would not the payment to such person designated to act as Treasurer of any salary or compensation, under the conditions named, be a wrongful payment out of County Funds, and in such an event would not the Probate Judge, or Chairman of the Board of Revenue of said County, under Section 321 of the Code, be liable for the amount of warrants drawn in payment of such salary or compensation?

(3) Where the minutes of the Commissioners Court fail to show that any bids, from such banks as referred to above, have been invited or received, and where the minutes also fail to show that any Treasurer was selected for any particular calendar year, would not the payment to any person ostensibly acting as Treasurer for salary or compensation be without authority of law, and would not the Probate Judge be liable on his official bond for the amount of warrants drawn in payment of such salary as monies illegally expended from the County Treasury?

(4) Is it, or is it not the duty of a Commissioners Court or Board of Revenue of a County to invite bids to be filed by the first Monday in December of **each year**, and to consider such bids as have been filed by such banks, as referred to above, on the particular date mentioned in Section 316 of the Code, and has the Court of County Commissioners or Board of Revenue any authority to make a contract with any bank for a longer period than one year?

(5) Does not the provisions of law, as set forth in Article II, beginning with Section 312 and including Section 324, contemplate an annual selection of a depository, or an annual designation of a person to act as Treasurer?

(6) Is it not mandatory, where bids have been filed by such banks as particularly mentioned in Section 316 of the Code, on the Commissioners Court or Board of Revenue of a County to place the County funds with such bank as offered the highest rate of interest on daily balances or bank deposits?

(7) Has a Court of County Commissioners or Board of Revenue any authority under the law to select any bank, such as is mentioned in Section 316, other than the bank that has offered the highest rate of interest to the County on daily balances or bank deposits?

(8) Has a Court of County Commissioners or Board of Revenue any authority to designate a person to act as Treasurer for a longer term than one year?

(9) Where a bank, such as is mentioned in Section 316, has been selected as Depository and the Commissioners Court has ordered that the County Funds be placed in such bank for a period of one year, has the Court of County Commissioners or Board of Revenue any authority to also employ or designate someone to act as Treasurer at a stipulated salary?

(10) In considering this last question in case your advice is that there could not be a Depository selected and a Treasurer also employed, would not the designation of a person to act as Treasurer be a void action on the part of the Court of County Commissioners or Board of Revenue, and would not the payment to such person, designated to act as Treasurer, of any salary or compensation be a wrongful payment out of County Funds, and would not the Probate Judge, or President of the Board of Revenue, or the officer signing such warrants, be liable on his official bond for the amount of the warrants so drawn?

(11) Has the Commissioners Court or Board of Revenue any authority of law, directly or indirectly, to compensate in any way a County Depository which has been selected under the provisions of the law for the handling of County funds either by payment of premiums on bonds, or the employment of clerical help, or in any way compensate said Depository by ordering money paid from County funds for such purposes?

(12) Where a County has failed to have bids filed by any bank or banks for the handling of the funds of the County, and a person has been designated to act as County Treasurer under Section 322 of the Code, is a bond required by such person to be conditioned upon the same terms as are stated in Section 302 of the Code, which has to do with a bond of a Treasurer elected by the people?

(13) Has a Commissioners Court or Board of Revenue of a County any authority to designate a person to act as Treasurer of a County without placing such person under a bond, and without specifying in the minutes of the Commissioners Court the amount of such bond?

Answering your first question, I am of the opinion that the condition precedent to the exercise of the authority granted to county governing boards by Section 322 of the Code of Alabama, 1923, to designate some individual to act as county treasurer is that such boards be unable to designate any county depository by reason of their inability to secure from any bank within the limits of the county terms for the handling of county funds as provided in Chapter 17, Article II of the Code of Alabama, 1923, satisfactory to such governing boards.

In other words, the manifest meaning of the statute is that the governing boards of the county must, before designating an individual to act as county treasurer, have made due effort to secure satisfactory terms from some bank within the county as provided by Article II, of which Section 322 is a part.

Under the circumstances mentioned in your second question the designation of an individual to act as county treasurer would be unauthorized, and the payment of any salary or compensation to any person designated by any county governing board to act as county treasurer complying with the provisions of Section 322, *supra*, would be illegal, and any Probate Judge, President of the Board of Revenue or Court of County Commissioners who draws a warrant in payment of such salary or compensation would be liable for the amount of such warrant, provided such warrant is paid.

The minutes of any county governing board should show that the proper effort was made to secure bids from the banks within the county, and the results of such efforts—either that no bids were received or, if received, the reason for rejecting them,—before such governing board could legally designate some individual to act as county treasurer.

Answering your third question, I am of opinion that the minutes of all county governing boards should show that proper effort was made to secure bids, and the action of said boards thereon, and in the event no county depository is selected, then the minutes should show the designation of some individual to act as county treasurer for the calendar year. The payment of any salary or compensation to any individual acting as county treasurer without compliance with the above mentioned provisions of the statute would be illegal, and the Probate Judge, President of the Board of Revenue or Court of County Commissioners who draws a warrant in payment of same would be liable on his official bond for the amount of such warrant, if the same is paid.

Answering your fourth question, I am of opinion that the manifest meaning of Section 316, Code of Alabama, 1923, is that all county governing boards should make due effort to secure sealed bids by the first Monday in December of each year, and from these sealed bids select some State or National Bank to serve as a depository under the provisions of Article II, *supra*.

These sealed bids should be opened and considered on the first Monday in December of each year. Section 316, *supra*, clearly provides that the selection of such depository should be for the following calendar year. This Section authorizes such selection of a depository for only one year, and there is no provision of law which authorizes county governing boards to select a depository for a longer term than one year.

Answering your fifth question I am of opinion that it was the legislative intent, in enacting the law as embodied in Chapter 17, Article II, Code of Alabama, 1923, to require an annual selection of a county depository, and in the event no county depository is selected, this Article provides in Section 322 that Board of Revenue or Court of County Commissioners may designate some individual who may act as county treasurer under such terms and conditions as may be fixed by such boards.

It appears from the provisions of Article II, *supra*, that when any county governing board does select a county depository, such depository serves for only one year.

In the event no county depository is selected, and some individual is designated to act as county treasurer, such designation could not be for a longer period than one calendar year, since under Section 316, *supra*, it becomes the duty of the county governing boards to make the proper effort to secure and to receive bids, and to open and consider the same on the first Monday in December of each year. Should an individual be designated to act as county treasurer for a longer period than one year, and some qualified bank should submit a satisfactory bid, it would be the duty of such county governing board to appoint it as a county depository, and when this was done, the individual previously selected to act as county treasurer would cease to act in said capacity.

Sections 316 and 322 are to be construed in *pari materia* and when this is done, the provisions of Section 316 would prevent the appointment of an individual to act as county treasurer for a longer period than one year. While Section 322, *supra*, allows a certain discretion to county governing boards, when this Section is construed together with Section 316, it does not permit the selection of an individual to act as county treasurer for a longer period than one year.

See *J. A. Jenkins v. State of Alabama, ex rel C. L. Watson* (now in manuscript).

Answering your sixth inquiry, am of opinion that Section 316, *supra*, is not mandatory. County governing boards are not necessarily required to place the county funds in such banks as has offered the highest rate of interest on daily balances. This Section is to be construed in connection with Section 322, *supra*, which provides that the terms of the bidding banks must be satisfactory to the county governing boards, otherwise they are authorized to designate an individual to act as county treasurer. Under these two Sections the county governing boards are allowed a discretion in selecting a county depository, and they are not bound absolutely to select the bank offering the highest rate of interest on daily balances.

Citizens Bank & Securities Co. v. Commissioners Court of DeKalb County, 209 Ala. 646.

The answer to your seventh question is in the affirmative. As pointed out in my answer to your sixth question, the county governing boards can under the law exercise a discretion in selecting a depository, and the provisions of Section 316, *supra*, are not mandatory.

Citizens Bank & Securities Co. v. Commissioners Court of DeKalb County, 209 Ala. 646.

The answer to your eighth question is in the negative. Sections 316 and 322, Code of Alabama, 1923, are to be construed in *pari materia*. Section 316, among other things, provides for the opening of bids on the first Monday in December of each year, and for the selection of a county depository for the following calendar year. Section 322, *supra*, provides for the designation of an individual to act as county treasurer under the circumstances set out in said Section. In the event the terms mentioned in this Section are not satisfactory to said county governing board, then they may designate an individual to act as county treasurer, but in construing these two Sections together the terms of said individual designated to act as county treasurer could not be for a longer period than that allowed a county depository as set out in Section 316, *supra*.

See *J. A. Jenkins v. State of Alabama, ex rel C. L. Watson* (now in manuscript).

The answer to your ninth question is in the negative. No individual can be designated in this instance where a county depository has been selected. No county governing body can select a county depository, and also designate some individual to act as county treasurer. They must do one or the other, and cannot legally do both.

Section 322, Code of Alabama, 1923.

The answer to your tenth question is in the affirmative. Under the circumstances set out therein any qualified officer drawing such a warrant would be liable if the warrant is paid.

Section 321, Code of Alabama, 1923.

The answer to your eleventh question is in the negative. Section 320, Code of Alabama, 1923, expressly provides that county depositories shall not receive any compensation or commission or other allowance for services as county depositories. Such county depositories are not county officers within the meaning of Section 2658, Code of Alabama, 1923, which provides that premiums of county officers shall be paid by the county, and there is no provision of law for the payment by the county for clerical help.

Answering your twelfth question, I am of opinion that while Section 322, *supra*, authorizes the designation of some individual to act as county treasurer under the circumstances therein set out, and while no specific requirement for bond is made, yet we must consider Article II, *supra*, as a whole, and when so construed the county governing board is required to exact a bond of the individual designated to act as county treasurer in the manner provided by Section 317, Code of Alabama, 1923, relating to the bond of a county depository instead of in the manner provided by Section 302, *supra*, relating to the bond of a county treasurer.

I am of opinion that it was the legislative intent to require a bond of the individual designated to act as county treasurer, just as it required bond of a

regular county treasurer under Section 302 of the Code of Alabama, 1923, and just as it required bond of the county depository under Section 317, Code of Alabama, 1923.

It is inconceivable that the Legislature intended to permit the designation of such an individual with such responsible powers and duties without requiring an adequate bond for the protection of the financial interest of the county.

The answer to your thirteenth question is in the affirmative. I have already ruled in answer to your twelfth question that the individual designated to act as county treasurer should be required to give bond, and I am further of the opinion that the minutes of the county governing boards should show that such bond was required, and the amount of this bond.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 29, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Excise tax—benzol subject to.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 15, 1929. (Request No. 968). You request my opinion:

Is benzol subject to the gasoline excise tax?

In answer will state that it is. Benzol comes within the term "device or substitute" for gasoline, and it is taxable regardless of use.

See the two former opinions of this office recently written to you relating to the excise tax law on gasoline.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 29, 1929.

Judge of Probate,

Troy, Pike County, Alabama.

Money received by a County from the gasoline tax must be expended as provided by Section 9 of Act No. 340, approved August 27, 1927 (Acts 1927, pages 328 and 329).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of May 11th is acknowledged. You ask my opinion as follows:

1st. Can a County lawfully expend the gasoline tax money to be paid for the ensuing six months for necessary maintenance of the public roads of the County, regardless of the fact that the County has already spent more than its estimated income for the fiscal year 1929?

2nd. Can any part of the gasoline tax money be used when collected, for the purpose of paying any debt contracted for necessary maintenance of the roads during the year, 1928, and prior to October 1, 1928?

In reply will say that Section 9 of Act No. 340, approved August 27, 1927 (Acts 1927, pages 328 and 329), provides for the expenditure of the gasoline tax money distributed by the State to the several counties of the State.

So far as necessary, for present purposes, to quote, said Section reads as follows:

"The proceeds of the excise tax prescribed in this Act shall, when collected, be paid into the State Treasury, and placed to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State and be paid to each of the several counties as provided by law. Provided, however, that all the funds derived by the several counties from said tax shall be expended exclusively for maintenance and repair of roads, highways and bridges in said County. The use or expenditure of any of said funds in any other manner or for any other purpose than as provided herein, by the governing body of any county or any individual member of said body shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail, or at hard labor for the county, for not less than one nor more than twelve months."

It is my opinion from a careful study of said Act, that it was the legislative intent to provide a fund, which would be constantly coming to the county and available for current maintenance and repair of roads. It was not intended that such taxes should, or could, be pledged in advance for the giving of credit, or be used, at any time, for the payment of anything other than

current expenses for maintenance and repair of roads, highways and bridges of said County.

It was not intended that the gasoline tax should constitute the only money available for County roads and bridges; but that this particular tax, as collected, should be available for the use named and for that use only. It cannot be pledged in anticipation of collection or used, when collected, for the payment of past due debts. All debts contracted prior to receipt of this tax fund, must be paid from money derived from some other source. This money is paid over monthly and must be available for maintenance and repair of the county roads and bridges after being received.

The foregoing answers both of your questions.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 29, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

"Gasoline"—excise tax on—what not subject to excise tax.
Opinion by the Attorney General.

Dear Sir:

I have your letter of October 6, 1929, in which you invite attention to an Act approved Feb. 10, 1923, as amended by an Act approved August 27, 1927, and to an Act approved January 25, 1927 (General Acts 1927, p. 16, 326) dealing with the excise tax on motor fuel. You state that a great many small manufacturing plants use crude oil as fuel in combustion engines; that such oil is not used either for heating or lighting purposes in the instances referred to; that the crude oil thus used seems to be a substitute for gasoline. You then refer to the statutory definition of the term "gasoline" as carried in the aforementioned Acts, and request my opinion:

Under said Acts, should the excise tax provided thereby be collected on all crude oil used in internal combustion engines?

In my opinion, it was not the intention of the Legislature to require the payment of an excise tax on crude oil, kerosene oil or the type or types of fuel oil not commonly used in internal combustion engines.

The statutory definition of the term "gasoline," as used in both of said Acts, is as follows:

" * * * the term gasoline shall include gasoline, naphtha and other liquid motor fuels or any devices or substitutes therefor, commonly used in internal combustion engines; provided however, that nothing

contained in this Act shall be held to apply to those products known commercially as 'kerosene oil,' 'fuel oil,' or 'crude oil,' used for lighting or heating purposes. * * * "

In my judgment the above quoted part of said Acts, in effect, provides a classification of oils into two distinct groups, viz:

(1). Gasoline and those other liquid motor fuels which are commonly used in internal combustion engines, and which are subject to the excise tax regardless of whether put to that use or not. ●

(2). Crude oil, kerosene oil and other fuel oils which are commonly used for lighting and heating purposes, and which, because commonly used for those purposes, are not to be subject to the excise tax even though there may be some instances in which an oil commonly used for lighting and heating purposes, is used as a substitute for gasoline in some internal combustion engines.

The expression "commonly used in internal combustion engines," with reference to gasoline in the above quoted portion of said Acts, was not intended to limit the excise tax solely to that gasoline which is actually used in internal combustion engines. The expression was used by the Legislature, in my judgment, rather in an explanatory way. Likewise, the expression "used for lighting and heating purposes," with reference to kerosene, fuel oil and crude oil, was put in the Act by the Legislature, not for the purpose of explaining that such oils are used for those purposes. In other words, it is not the use to which gasoline is put that determines whether it is taxable under said Acts, for one may use gasoline for lighting or heating purposes, and it is often used for such purposes, yet, even though so used, it is subject to the tax for the reason that its common use is in internal combustion engines as a liquid motor fuel. Crude oil is used as a liquid motor fuel in some internal combustion engines as a device or substitute for gasoline, yet, even though so used it is not subject to said tax for the reason that its common use is for lighting and heating purposes.

An examination of the statutes relating to the subject and to the Tax Commission indicates that there has been no legal machinery provided for collection of this excise tax based on use, but such machinery is provided for collection based on quantity sold. This, in my judgment, strengthens the position taken herein.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 29, 1929.

The Judge of Probate,
Fayette, Fayette County, Alabama.

Deed Tax—Where mortgage and contract cover same property, and mortgage is recorded and tax paid. No tax due on the contract.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 23, 1929, in which you enclose an original mortgage dated October 27, 1928, for the sum of \$660, having as security 55,000 feet of lumber in Greene County, Alabama, this mortgage was recorded in Greene County on November 2, 1928, and a mortgage tax of \$1.05 was paid to the probate judge on said date. You also enclose a contract between the same parties which purports to refer to the same debt and property as set out in the recorded mortgage, the contract is signed on the same date as the mortgage, by the same parties.

Upon submitting those two documents for inspection, you request the opinion of the Attorney General on the following question of law:

Whether or not I should charge a mortgage tax on each of these written instruments, or just on the mortgage?

The property described in the mortgage is in Greene County, Alabama, the mortgage has been recorded in Greene County, and the mortgage tax paid. I therefore, see no reason why it should be recorded in Fayette County. However, should it now be recorded in Fayette County no further mortgage tax should be collected.

I am of the opinion that the contract submitted by you pertains to the property set out in the mortgage and refers to the mortgage itself, and is signed by the same parties on the same date. Therefore, the two papers being for the same transaction and the tax having been paid on the mortgage, no tax would be due on the contract. The contract simply provides a method of marketing the lumber covered in the mortgage and the price that it should be sold for, and how the money collected should be paid out by the mortgager. I am herewith returning mortgage and contract.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 29, 1929.

The Clerk of the Circuit Court,
Luverne, Crenshaw County, Alabama.

Solicitor's fees—license cases—motor vehicles.
Opinion by the Attorney General.

Dear Sir:

I have your letter of May 28, 1929. In it you request my opinion as to the proper solicitor's fee on convictions in the following cases:

1. Operating an automobile without having first taken out and paid for a license.
2. Operating an automobile with a lost or stolen tag.

In answer to your first question will state that the solicitor's fee is \$30.00.

In answer to your second question will state that the solicitor's fee is \$30.00.

Operating a motor vehicle without having first obtained a license to do so, is a violation of the Revenue Law. (See 5424, Code of Alabama 1923).

Your attention is also invited to Section 24 of an Act approved Sept. 13, 1923 (General Acts 1923, p. 292). That Section makes it unlawful:

1. For one to mutilate or destroy for the purpose of deception any motor vehicle tag provided by that Act.
2. For any person to use upon his car any tag in imitation or substitution for real tags lawfully used.

3. It is provided that where a tag has been lost, mutilated or destroyed, a new one may be obtained from the Tax Commission by the payment of \$1.00 and if the replacement tag be in lieu of a mutilated tag, then the mutilated tag shall be forwarded with affidavit to the State Tax Commission in order to obtain a replacement tag. If the replacement tag be in lieu of a lost tag, and the lost tag comes into the possession of the owner, it is the duty of the person obtaining the new tag, immediately to forward the lost tag to the Tax Commission.

Under this particular set of circumstances, should the owner of the lost or mutilated tag, or anyone else, use it upon any motor vehicle, he must be fined twice the amount of the license required for motor vehicles upon which the tag is used and shall also be required to procure a license for said motor vehicle.

Under Section 5424, Code of Ala. 1923, it is a violation of the law to operate a motor vehicle without having first obtained a license to do so.

All of these things are violations of the Revenue law and the proper solicitor's fee is \$30.00 in each case.

On the other hand, however, we have ruled that where one operates a motor vehicle **without any tag** on the vehicle, the solicitor's fee is \$10.00. Also operating a motor vehicle with the tag placed improperly on the vehicle carries a \$10.00 solicitor's fee. In these cases the party may be operating the vehicle with or without a **license**, and if without a license (instead of **tag**) he should be charged under 5424, Code, supra. You will keep in mind of course, the distinction between a **tag** and the **license**. The tag is merely evidence of the license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 30, 1929.

The Judge of Probate,
Andalusia, Covington County, Alabama.

Money paid to Judge of Probate for license can be refunded only when paid through error or mistake on the part of the Judge of Probate—Sections 375 and 376, Revenue Act 1919, (General Acts 1919, p. 445).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of May 17, 1929, is acknowledged. You state that the Consumers Ice and Cold Storage Company of Andalusia, Alabama, was cited by the License Inspector in August, 1927, to take out license for cold storage plant. It took out the license. In October, 1927, and again in October, 1928, it took out the license, paying each year for license \$38.00. Its refrigeration capacity was only about 10,000 cubic feet.

Said company now applies to have the money so paid for license refunded. You wish to know if such refunding is legal.

Under the facts stated, no license was required of said company. Schedule 30 of Section 361 of the Revenue Act, 1919 (Acts 1919, p. 405), reads as follows:

"Each person engaged in the cold storage business shall pay an annual license according to the following schedule; for each refrigerating capacity of fifty thousand and not more than one hundred thousand cubic feet, twenty-five dollars;" etc.

No license is required where the refrigeration capacity is less than fifty thousand cubic feet, still any person who desires a cold storage license is entitled to get one whether he needs it and uses it or not. He is entitled to a refund of the money paid only when he states the facts to the Judge of Probate and the error is made by the Judge of Probate.

The only provision of law for refunding a license tax when paid to the Judge of Probate is found in Sections 375 and 376 of the Revenue Act, 1919 (Acts 1919, page 445). Under these sections, as you will see on examination of said Section 375, only persons "who through mistake or error on the part of the Judge of Probate has paid to the Judge of Probate money that was not due from him for such license or by such mistake has paid to the Judge of Probate for such license an amount in excess of that required by law," are entitled to have the money paid refunded.

In the case mentioned by you, if the money was paid to you through your error or mistake, then, in my opinion, you should make the certificate provided for by said Section 376, and the money should be refunded. Otherwise, there is no provision of law by which it may be refunded.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 30, 1929.

The Sheriff,
Prattville, Autauga County, Alabama.

Officers—License Inspector not entitled to office space in County Courthouse.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 20, 1929. In it you request my opinion:

Is the license inspector entitled to be furnished office space in the county courthouse?

In answer will say no. There is no provision of law requiring the Court of County Commissioners to furnish a license inspector with an office in the county courthouse.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 30, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Licenses—Schedules 25 and 124 of Section 361 of an Act approved Sept. 15, 1919, not repealed by sub-section 2-J of Section 2 of an Act approved July 22, 1927 (General Acts 1919, p. 404, 438; General Acts 1927, p. 142), concerning cigarettes, cigars, etc.

Licenses—Social Clubs not exempt from payment dealers license for cigarettes and cigars or sales tax under 1927 Act.

Licenses—Social Clubs—to sell soft drinks at retail—Schedule 96 of Act of 1919, *supra*.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 24, 1928, also your letters of June 26, 1928, and March 29, 1929. You state that social clubs throughout the State have heretofore been required to pay license under Schedules 25 and 124 of the Act of 1919, *supra*, but that none of these clubs are regularly engaged in the sale of these articles to the public generally. You further state that these clubs practically sell only to members, though doubtless, when a member is entertaining a guest, they will sell to such guests. In your letter of March 29, 1929, you indicate that such clubs are also selling soft drinks at retail in the manner in which they sell cigarettes, etc. You request my opinion:

First. Does sub-section 2-J of Section 2 of an Act approved July 22, 1927 (General Acts 1927, p. 142), imposing a tax of an amount equal to 15% of the wholesale sales price on cigars, cigarettes, cheroots, or any substitute therefor, sold within the State of Alabama, repeal Schedules 25 and 124 of Section 361 of an Act approved September 15, 1919, imposing a license tax on cigarette and cigar dealers?

Second. Under the facts stated, are social clubs exempt from the payment of licenses set forth in Schedules 25 and 124, *supra*, and the tax set forth in sub-section 2-J of Section 2, of the Act of 1927, *supra*?

Third. Under the facts stated, are social clubs, selling soft drinks at retail, in the manner set forth, required to obtain a license to engage in such business under Schedule 96 of Section 361 of the Act of 1919, *supra*?

In answer to your first question, will state that sub-section 2-J of Section 2 of the Act of 1927, *supra*, does not repeal Schedules 25 and 124 of Section 361 of the Act of 1919. Schedule 25 is an occupation tax. So, also, is Schedule 124. Sub-section 2-J of Section 2 of the Act of 1927 is a sales tax.

It matters not what the Legislature called the sales tax, for the courts will look to substance and not to form.

Panhandle Oil Co. v. Knox, 277 U. S. 218.

In answer to your second question, will state that if a social club deals in cigarettes, cigars, etc., in the manner stated by you, it must obtain license under Schedules 25 and 124, and a sales tax must be paid as required by sub-section 2-J of Section 2 of the Act of 1927. There is no provision of law exempting social clubs from the payment of these licenses and sales taxes. The sales tax, under sub-section 2-J should be collected in the manner therein provided. In my judgment, social clubs selling cigars, cigarettes, etc., to their members are "dealers" therein. The privilege to run a social club does not

carry with it the right, under guise thereof, or as a convenience to the members thereof, to go into the cigar or cigarette business, free from taxation.

In answer to your third question, will state that social clubs, under the facts set forth by you, must take out the soft drink license. The reasoning set forth in my answer to your second question applies here.

As evidence of the fact that social clubs are not exempt from taxation under the foregoing Schedules, (see Schedule 86 of Section 361 of the Act of 1919, *supra*) where social clubs are specifically exempted from pool table license. Where the Legislature intends such clubs to be exempt from schedules of licenses, the exemption is written into the schedule.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 30, 1929.

The Judge of Probate,
Centreville, Bibb County, Alabama.

License—Automobile accessories—License does not permit carrying on business at more than one place.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 4, 1929. In it you state that Brown Frederick of the Frederick Motor Co., West Blockton, Alabama, has taken out a license as a dealer in automobile accessories. He has also opened up in the same town, and within a few blocks of his present place of business, another place for the sale of such accessories, which accessories he obtains from wrecking second-hand cars traded in his regular business as a dealer.

You request my opinion:

Where one has taken out a license under Schedule 13 of Section 361 of an Act approved September 15, 1919 (General Acts 1919, p. 282), as a dealer in automobile accessories, does such license permit him to deal in such accessories at more than one place in the same city or town?

In answer I call your attention to Section 363 of the Act above cited, and particularly that portion which is as follows:

“* * * nor does it (the license) entitle the holder thereof to carry on any other business or to do any other act than that named therein, nor at any other location than that therein specified.”

Therefore, if one desires to deal in automobile accessories including automobile tires, and obtains a license as dealer in such, that license does not permit him to put up two or three places of business in the town in which he obtains the one dealer's license. He must obtain a separate dealer's license for every place at which he deals in automobile accessories.

It might be well that I invite your attention to an opinion rendered January 26, 1925, to the Judge of Probate, Tuscaloosa County, in which this office held that one of the regular and necessary parts of an automobile is not an accessory and that it was for that reason that tires were specifically included in the statute. For instance a battery is not an accessory, neither is a crankshaft, a wheel, a radiator, etc. A spotlight is an accessory, so is a cigar lighter, clock or bumper, etc.

Again one may be liable for license for an automobile repair garage and not accessory dealer's license, as for instance, one who runs a shop for repair of batteries or painting automobiles is not a dealer in accessories, but is liable for a license as an operator of an automobile repair garage.

(Opinions Attorney General, 1924-1926, p. 70.)

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Copy to:

The State Tax Commission,
State Capitol,
Montgomery, Alabama.

May 30, 1929.

The Sheriff,
Grove Hill, Clarke County, Ala.

Sheriffs—allowance for preparing and serving food to prisoners does not mean that sheriff furnishes fuel at his own expense.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 14, 1929. In it you request my opinion:

Is it the duty of the court of county commissioners to furnish and pay for wood used by the sheriff in preparing and serving food to prisoners in the county jail?

In answer will state that it is. Under Section 3 of an Act approved September 29, 1923 (General Acts, 1923, p. 704), as amended by Section 1 of an Act approved September 6, 1927 (General Acts, 1927, p. 693), the sheriff, except as otherwise provided by existing laws, is paid by the State such amount as is actually necessary for food for each prisoner daily, but the said amount shall not exceed forty-five cents per capita. Under Section 4 of said Act of 1923 as amended by Section 2 of said Act of 1927, the sheriff is allowed a certain amount per capita, depending upon the number of prisoners, as an additional amount for "preparing and serving" food to the prisoners. Where the sheriff is on a salary basis the allowances above mentioned are not paid to the sheriff, but are paid into the county treasury and the board of revenue

or court of county commissioners is required to furnish the sheriff on a salary basis with such help as is necessary for preparing and serving food to the prisoners. (Section 3 of the Acts of 1927, *supra*.) Section 4878, Code of Alabama, 1923, provides that the expenses incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail shall be paid out of the funds of the county.

Equipment necessary for the preparation of the food for prisoners, such as cooking utensils, as well as crockery or dishes for serving the food to the prisoners, should be furnished by, and is a proper charge against the county. The actual expense of preparing food, which includes serving and cooking it, should be furnished by the sheriff himself. All the mechanical means necessary for preparing and serving the food should be furnished by the county.

(Opinions of Attorney General, 1918-20, p. 28.)

It appears that on November 18, 1918, the Attorney General rendered an opinion to the State Prison Inspector, holding that the county should furnish the coal or other fuel necessary to prepare meals for the prisoners in the jails. On April 5, 1921, the Attorney General rendered an opinion to the Chief Examiner, Department of Examiners of Accounts, in which the last above mentioned opinion was upheld.

(Opinions of Attorney General, 1920-22, p. 144.)

Where officers have been instructed by opinions given by the Attorney General, and have been acting upon such interpretation of the law, such interpretation and practice will be of great weight in construing the law. Where there is doubt as to the meaning of a statute, the contemporaneous construction given by the workers administering the law should be looked to in reaching a conclusion.

(Opinions Attorney General, 1920-1922, p. 144.)

Shepherd v. Sartain, 185 Ala. 456;

State v. Board of Commissioners of Mobile County, 183 Ala. 554.

The practice of charging the cost of fuel for preparing the food of prisoners in the county jail to the county, was established before the passage of the Act of 1920 (General Acts, 1920, p. 28), which inaugurated the system of separating the cost of food from the cost of preparation in allowances made. This being the practice at the time of the enactment of the 1920 Act, and no specific change having been made by the Legislature since that time, it should be assumed that the Legislature did not intend to disturb that practice.

The allowance for preparing and serving food is not reasonably sufficient to cover more than the cost of employing cooks and other servants to prepare and serve it.

In an opinion dated August 12, 1924, to the Judge of Probate of Dallas County, the question was raised as to the authority of the board of revenue to pay for the expense of a cook for the sheriff in preparing food for prisoners. It was there held that under Section 4 of the Act of 1923, *supra*, the allowance in said Section for preparing and serving the food was intended

to cover cooking, as well as furnishing and preparing the food, and that, therefore, the sheriff had to pay for the cook. That is all that was covered by that opinion on this particular point.

(Opinions Attorney General, 1922-24, p. 424.)

The opinion of June 24, 1911, to the Chief Examiner, Department of Examiners of Accounts, in which it was held that the sheriff should furnish **at his own expense** cooking utensils necessary for preparing the food for prisoners, **should no longer be followed.**

(Opinions Attorney General 1910-12, p. 111-114.)

That part of an opinion dated January 9, 1913, to the State Prison Inspector holding that the **sheriff** should furnish fuel with which to cook food for the prisoners **should no longer be followed.**

(Opinions Attorney General 1912-14, p. 90.)

The opinion dated April 28, 1927, to the President, Board of Revenue, Shelby County, holding that the Board of Revenue under Section 4878, Code of Alabama, 1923, had authority to purchase a cook stove to be used by the sheriff exclusively in preparing food for prisoners, correctly states the law. In that opinion it was also held that the county should furnish fuel to be used exclusively in cooking and preparing food. That is correct.

(Opinions Attorney General, Office Edition, Volume 2, p. 77.)

So, also, is the law correctly interpreted in an opinion dated June 14, 1927, to the Sheriff, Marion County, Alabama, holding in accord with the last above mentioned opinion.

(Opinions Attorney General, Office Edition, Vol. 2, p. 189.)

In an opinion dated January 30, 1928, to the Chief Examiner, Department of Examiners of Accounts, the Attorney General held that, under Section 4878, Code of Alabama, 1923, the word "maintenance" embraces the item of fuel for preparing the prisoner's food and was a proper charge against the county. That opinion is correct.

(Opinions Attorney General, Office Edition, Vol. 4, p. 188.)

All former opinions of this office in conflict in any way with this opinion, whether in this or in any previous administration, are hereby overruled.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

May 30, 1929.

The Chairman,
State Tax Commission,
Montgomery, Ala.

Licenses—Collecting Agency circulating cards showing its address, telephone number is subject to license under Schedule 31 of Section 361, Acts 1919.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 20, 1929, in which you state as follows:

The Dixie Collection Agency maintains an office at 217 North 22nd Street in the City of Birmingham, Ala. It has cards printed giving its business address and telephone number. It does not solicit claims for collection in any way except that it advertises, as shown by the card you attached to your letter.

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Does the fact as stated constitute the Dixie Collecting Agency, a collecting agency, which would be subject to the license provided for in Schedule 31, Section 361, p. 405, of the Acts of the Legislature, 1919?

Schedule 31 is as follows:

"Schedule 31. COLLECTING AGENCIES.—Each collecting agency in towns and cities of twenty thousand or more inhabitants, one hundred dollars; in towns and cities of less than twenty thousand inhabitants, twenty-five dollars. Each person, firm, association of persons, or corporation which shall employ agents to solicit claims for collection, or shall send out circulars or other notices soliciting claims for collection from persons, firms or corporations in the State, shall be deemed a collecting agency within the meaning of this Schedule."

I am of the opinion that the words, "each person, firm, association of persons, etc.," is to be considered as a definition of the meaning of the words "collecting agency," and that no person, firm or corporation is liable for this license, unless they employ agents to solicit claims for collection, or shall send out circulars or other notices, soliciting claims for collection from persons, firms or corporations in this State.

I am of the opinion that the enclosed card when circulated is a circular or other notice soliciting claims for collection. The card gives notice that Dixie Collection Agency has a place of business at 217 North 22nd Street, Birmingham, Alabama, that its telephone Number is 3-2474, that it does a collecting business, and that David T. Boozer is in charge of said collecting

agency. The agency circulating this card can have no other purpose in view than soliciting claims for collections and are therefore subject to the license provided in Schedule 31, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 30, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

License—Dealers in automobile accessories—amplifying opinion of May 7, 1929, to Tax Commission.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 13, 1929, acknowledging receipt of an opinion by the Attorney General to the State Tax Commission dated May 7, 1929, concerning Schedule 13 of Section 361 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 402). In your letter of May 13, 1929, you also invite attention to an opinion by the Attorney General to the State Tax Commission dated June 28, 1928, in which the term "peddlers" was defined. In referring to the opinion dated May 7, 1929, you state that the Birmingham dealer in automobile accessories has an established place of business in Birmingham for the sale of such accessories, and said dealer, in addition to selling and delivering automobile accessories at the place of business in Birmingham, desires to send out his trucks loaded with automobile accessories to other cities and towns and from said trucks make sales and deliveries of said accessories to retail dealers only. You further state that heretofore, in accordance with your understanding of the Attorney General's opinion dated June 28, 1928, *supra*, you have taken the position that sales made to persons for the purpose of retail, did not constitute peddling within the meaning of the law.

Upon this statement of facts, you request my opinion:

Is the Tax Commission to understand from the language used in the Attorney's General's opinion of May 7, 1929, that the Attorney General holds sales made to retail merchants by going from place to place, constitutes peddling?

In answer will state that it was not my intention to give any such construction to the term "peddler." I understood that the Birmingham dealer in automobile accessories was sending out his trucks loaded with accessories to other cities and towns in the State, and was making sales and deliveries from the trucks to persons generally. This office has always drawn the distinction between persons selling merchandise to retail dealers for the purpose

of resale and those who retail merchandise from place to place. A peddler is one who **retails** by carrying his merchandise around from customer to customer.

Randolph v. Yellowstone Kit, 83 Ala. 471.

The opinion dated June 28, 1928, *supra*, defining peddlers, still holds, and is in no sense overruled by the opinion dated May 7, 1929, *supra*.

The license for the Birmingham dealer to deal in automobile accessories permits him to deal therein only at the established place of business where he stated he would deal when he obtained said license. If he desires to send trucks loaded with accessories throughout the State and therefrom make sales and deliveries to **persons generally** and not for resale, then the person in charge of each truck becomes a peddler and is due a peddler's license. On the other hand, if the Birmingham dealer sends his trucks loaded with accessories to other cities and towns in the State, and there, from these trucks, make sales and deliveries to retail dealers in accessories, then the Birmingham dealer is due a dealer's license in each place of such sort in which he thus deals in accessories. His truck becomes his temporary place of business in such towns.

In other words, as stated in the opinion dated May 7, 1929, a dealer's license to deal in automobile accessories at a definite place of business in Birmingham does not authorize the licensee to carry on that business at any other place than the established place of business mentioned by him when he obtained said license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 4, 1929.

The County Superintendent of Education,
Anniston, Calhoun County, Alabama.

Schools—selection of trustees for.

Opinion by the Attorney General.

Dear Sir:

I have your letter of June 1, 1929. In it you request my opinion:

Is it legal for the County Board of Education to appoint three trustees of local school districts when the patrons of the local school nominate only three or less than six?

In answer will state that school trustees are not selected for school districts but said school trustees are selected for each particular public school. The selections are made by the County Board of Education from nominations of qualified persons by the patrons of the particular school. While it is highly important that the patrons nominate the number required by law, from which these selections are to be made, nevertheless, I am of the

opinion that if the patrons nominate less than the number they are expected to nominate, the appointment of school trustees from this number thus nominated is not violative of any law. However, I am of the opinion that the County Board, as a condition precedent to appointment of trustees for a school, can require the patrons to nominate the number provided by statute, and the patrons failing to do so, the Board may suspend action on appointment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

Hon. V. H. Carmichael,
Judge County Court,

Jasper, Walker County, Ala.

Witness fee: Local Act of 1907, fixing witness fees in criminal cases not violative of Section 105 of Constitution 1901, but is violative of Section 96, and is invalid.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of May 20th.

You state that fees for State witnesses, including mileage, are fixed by a general law.

Section 3762 of the Code of Alabama, 1923.

You also state that the Legislature of 1907 enacted a Local Act, (Local Acts 1907, p. 902) applicable to Walker County, fixing the fees of State witnesses at a different per diem and providing a different mileage than the general act referred to as Section 3762 of the Code.

You inquire whether or not the Local Act in question is violative of Section 105 of the Constitution of 1901, or otherwise invalid.

I am of the opinion that the Local Act fixing different fees for State witness in Walker County is invalid.

But this Act does not fall within the inhibition of Section 105 of the Constitution.

A Local Law fixing witness fees in criminal cases is not one of enumerated local acts inhibited by Section 104 of the Constitution of 1901.

Section 105 of the Constitution has been repeatedly held to prohibit local legislation only on subjects enumerated in Section 104 of the Constitution.—This notwithstanding there is a general law dealing with the subject or system affected by the Local Law.

Polytinsky v. Wilhite, 211 Ala. 94.
Dunn vs. Dean, 196 Ala. 486.

However, I am brought to a consideration of the Local Act in question in view of Section 96 of the Constitution, which provides as follows:

"96. The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

It is clear that the fees, that is per diem and mileage, a witness receives is a charge of court, or a charge upon litigation.

Birmingham Electric Co. v. Harry, 215 Ala. 458.

Certainly to alter witness fees is to alter costs in criminal cases.

The Legislature is without authority to alter charges of court or costs by local act, except in localities protected in this respect by a constitutional amendment.

Section 96, Constitution 1901,
Vaughn v. Barker, 212 Ala. 461.

Birmingham Electric Co. v. Harry, (Supra).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

Tax Collector,
Tuscumbia, Colbert County, Alabama.

Taxes—payment of by sale of real estate.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of May 28, 1929, in which you state that a tax payer has failed to pay his assessment on real and personal property.

You request my opinion:

Would I have a right to accept ad valorem tax on certain lots and take credit for the taxes on the personal property?

In answer to your question I am of the opinion that if the tax payer has no personal property you may proceed to sell real estate for the payment of taxes.

Op. Atty. Gen. Book 10 (Office Edition) page 128.
Section 3067, Code of Alabama, 1923, 12 Enc. Dig., 162, et seq.
Morris vs. Waldrop, 213 Ala. 435.

You will observe that it is the duty of the Tax Collector after the first day of January of each year to proceed without delay to levy upon the personal property of delinquent tax payers for the payment of their taxes.

Section 3060, Code of Alabama, 1923.

By the terms of Section 3059, Code of Alabama, 1923, any lien holder or mortgagee of real estate included in an assessment with other real estate of the person or corporation to whom the real estate was assessed are subject to the lien of taxes upon other real estate may pay the proportionate or rateable part of such taxes. However, there is no authority of law for you to correct such payment on personal property. You may, however, proceed against the real estate in its entirety if you cannot locate the personal property.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

The State Tax Commission,
Montgomery, Alabama.

Licenses—laundries located in another state collecting and delivering laundry in this State not subject to license Schedule 62, Acts 1919.

Opinion by Assistant Attorney General Smith.

Gentlemen:

I have your letter of May 20, 1929, in which you state as follows:

"A laundry situated in the State of Mississippi sends its wagon regularly into Alabama.

This wagon takes up soiled clothes, carries them to the plant in Mississippi where they are laundered and then brings them back, delivering them to the owner and collecting at the time of delivery for the cost of the laundering."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Can license be collected under the above statement of facts under Schedule 62 of the Revenue Law 1919 (Acts of the legislature 1919, p. 418)?

Schedule 62 is as follows:

"Schedule 62. LAUNDRIES. For each laundry other than those run by hand power: In cities and towns of thirty-five thousand inhabitants and over, fifty dollars; in cities and towns of less than thirty-five thousand inhabitants, and not less than seven thousand inhabitants, twenty-five dollars; in all other places, fifteen dollars. For each laundry operated by hand power ten dollars, provided that no license shall be required of persons commonly designated 'washwomen.' This shall apply to hotels that make a charge for laundry work."

I am of the opinion that laundries provided for in the above schedule would have to be **operated in the State of Alabama** and the laundry work done in this State before a license can be collected. There is no provision of law whereby an agent collecting soiled clothes in this State for a laundry in another state, who takes them to the plant in another States, has them laundered and returns them to Alabama and collects for same, is required to take out a license.

However, if the laundry in another State is a corporation and carries on the business described by you it would have to qualify to do business in this State as a foreign corporation.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Local Statutes—Constitutionality—Local statutes providing for taxing and collecting fees and costs not applicable to the whole State are unconstitutional and void.

By Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 26, 1929, in which you request the opinion of the Attorney General on the following questions of law:

1. Whether or not Local Act of the Legislature, 1923, p. 121, is constitutional in view of Section 96 and Section 104, sub-division 24 of the Constitution of 1901?
2. If the Act is unconstitutional, whether or not the Circuit Clerk who has collected the fees set out in said Local Act, in criminal cases, in the County Court and appropriated the same to his own use is liable on his bond to Shelby County?
3. If the Circuit Clerk, while acting as Clerk of the County Court collected the fees set out in the Local Act and has failed to collect fees for the services performed by the Judge of the County Court as provided for in Section 3758 of the Code be liable on his official bond for the fees for services performed by the Judge of the County Court, which he failed to collect:
4. Whether or not in cases where the State fails to convict or a nol pros is entered, would the fees of the Clerk as provided for in the Local Act be a charge against the fine and forfeiture fund of the County?

In answer to your first question I am of the opinion the Local Act referred to, "To provide for the taxing and collecting of certain costs in criminal cases in the County Court of Shelby County" is unconstitutional and void as being in conflict with Section 96 of the Constitution of Alabama, 1901, which is as follows:

"The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, compensation or allowance of public officers."

Vaughn v. State, 212 Ala. 461, 462.

Opinion Atty. Gen. of date June 5, 1929, addressed to Hon. V. H. Carmichael, Judge County Court, Jasper, Walker County, Ala., Vol II (Office Edition) Opinion Atty. Gen.

This Local Act is also offensive to Section 104, subdivision 24 of the Constitution of 1901.

Having answered your first question in the affirmative, I am of the opinion that it was the duty of the Clerk of the Circuit Court acting as Clerk of the County, to tax costs and fees in criminal cases tried in the County Court in accordance with the fee schedule provided for in Section 3758 of the Code of Alabama, 1923, and Section 3739. Under Section 3758, the Clerk of the Circuit Court is ex-officio Clerk of the County Court, and for his services shall receive the same fees as are allowed by law for similar services performed in the Circuit Court. Therefore, answering your second question I am of the opinion that if he has collected any fees under the local law in excess of the amounts fixed in Sections 3758 and 3739 of the Code of Alabama, 1923, he is liable for the excess amount collected from each defendant, to the defendant who has paid the costs, and if he has collected any amount of costs under the local law which amount should have gone into the County Treasury under Sections 3758 and 3739, he would be liable to the County on his official bond.

In answering your third question, I am of the opinion that if the Circuit Clerk of the County Court has failed to tax and collect for the services performed by the Judge of the County Court and pay the same to the County as provided in Section 3758 of the Code of Alabama, he would be liable on his official bond.

In answer to your fourth question, I am of the opinion that fees due the Circuit Clerk acting Clerk of the County Court under the local act heretofore considered in this opinion would be in no instance be a charge against the fine and forfeiture funds of the County, but only such fees and costs as are provided for in Sections 3758 and 3739 of the Code of Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

Hon. Bibb Graves,
Governor of Alabama,
CAPITOL.

State Lands—Section 6851, Code of Alabama, 1923, does not authorize Governor to sell.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of May 8, 1929, with letter of May 7, 1929, from Hon. H. H. Evans to you enclosed. Mr. Evans states in his letter that the records in the office of the Judge of Probate of Calhoun County and the records in the office of the Secretary of State show that the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, Township 16, Range 7 in Calhoun County, was patented to the State of Alabama by the United States under authority of Congress of June 3, 1856. Mr. Evans also states that the Tax Assessor of Calhoun County assessed the above land as an "escape" a number of years ago against "owner unknown" and that such land was advertised for sale and purchased by an individual on June 10, 1925, at a tax sale. He further states that such individual conveyed the land to the present claimant and that claimant and his predecessor in title have paid taxes on said land for the last five years.

You request my opinion:

Does Section 6851, Code of Alabama, 1923, authorize the State of Alabama to sell the above described land to the claimant referred to above?

In my opinion said Section 6851 does not authorize the State to sell the land to claimant.

An Act of Congress approved June 3, 1856, (Vol. 11, U. S. Statutes at Large, p. 17) grants land to the State of Alabama for the purpose of aiding in the construction of certain railroads. Section 4 of said Act contains the following:

"And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in the manner following, that is to say: * * * * and if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

The land which claimant desires to purchase from the State was included in the grant made by Act of Congress of June 3, 1856.

Section 6851, Code of Alabama, 1923, provides for conveyance by the Governor of lands or lots owned or claimed by the State of Alabama. I rendered an opinion to you on June 15, 1928, in which I held that Section 6851, Code of Alabama, 1923, does not invest the Governor with authority to sell

lands belonging to the State. I am enclosing copy of such opinion so that you can forward same to Mr. Evans together with your letter to him. I am also enclosing copy of this letter to be forwarded to him.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

Judge of Probate,
Greensboro, Hale County, Alabama.

Fees of jurors: Jurors summoned in Probate Court in will contest cases are to be paid same fee and in same manner as jurors in Circuit Court.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 16, 1929, in which you state as follows:

"In the matter of a contest over the probating of a will, in the Probate Court, jury was summoned and the case was tried.

"It now develops that the only property left by the decedent was a tract of land which is mortgaged for more than its value. In other words, the estate is insolvent."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

There being no assets of this estate can the jurors be paid out of the general fund of the county?

I am of the opinion that jurors summoned in the Probate Court in a will contest case are to be paid the same fees, and in the same manner as jurors serving in the Circuit Court. This is provided for in Section 7294 of the Code of Alabama, 1923.

The fees of jurors in the Circuit Court and the payment thereof is provided for in Section 3760 of the Code of Alabama, 1923, which reads as follows:

"3760. Regular jurors' fees; proved by oath of juror; certificate of clerk.—Regular jurors, grand and petit, are entitled to three dollars for each day's services, five cents for each mile traveled in going to and returning from court, and ferriage and toll, to be proved by the oath of the juror before the clerk of the court, whose duty it is to give each juror a certificate, stating therein the number of days he has served, the number of miles he has traveled, the amount of ferriage and toll he has paid, and the amount of compensation to which he is entitled; which certificate shall be receivable in payment of county taxes, and other county dues, and payable out of the county treasury."

Considering these two Sections of the Code above referred to, you would be authorized to pay the jurors summoned in the Probate Court to try a will contest, out of the general funds in the county treasury just as jurors are paid in the Circuit Court. The insolvency of the estate involved in the will has nothing to do with the payment of jurors' fees.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

The Probate Judge,
Bay Minette, Baldwin County, Ala.

Mortgage Tax—Federal Land Bank mortgages not subject to privilege tax for recording.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 27, 1929, in which you state that there has been filed for record in your office several mortgages given on loans from the United States.

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Must I collect mortgage tax on these instruments?

I assume that you refer to mortgages executed to the Federal Land Bank. If this be the case I am of the opinion that such mortgages are not subject to the payment of the tax.

Attorney General Reports 1918-20, p. 440.

After the opinion above referred to was written the Supreme Court of the United States, held that no mortgage tax could be collected on mortgages given to the Federal Land Bank.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

The Sheriff,
Elba, Coffee County, Alabama.

Court of County Commissioners—Purchase of supplies for Sheriff.
Sheriff—must apply to Court of County Commissioners for purchase of supplies.

Opinion by the Attorney General.

Dear Sir:

I have your letters of January 20, 1929, and February 5, 1929. In them you state that some days ago you approached the Judge of Probate of your County, advising him that you were out of certain necessary supplies for the upkeep of the county jail and the county courthouse; that you requested the Judge of Probate to purchase said supplies and he refused to do so. The supplies desired by you consisted of disinfectant for the jail and both county courthouses, a spray for odor in the jail and courthouses, soap for scrubbing and cleaning the jail and oil for the floors of said courthouses. You further state that after the Judge of Probate refused to purchase said articles for the use mentioned, you proceeded to purchase same and the Judge of Probate now declines to pay the bill for these articles.

Upon this statement of facts you request my opinion:

Is the County liable for these purchases?

In answer will state that, as you know, the Judge of Probate is not the Court of County Commissioners. The Judge of Probate **officially and individually** does not purchase supplies for the County. No law clothes him with the power, as **Judge of Probate**, to purchase or refuse to purchase, necessary articles of the kind and for the use mentioned. Nor is there any law clothing him with power, as **Judge of Probate**, to allow or disallow a claim **properly itemized and presented to the proper authorities**. The Judge of Probate is not the **proper authority** to whom you should **present** such an account. The Court of County Commissioners is the proper authority. Your letter leads me to believe that you did not take this matter up with the Court of County Commissioners either before or after the purchase of the articles mentioned by you, but that you took it up solely with the Judge of Probate.

Subsections 1, 2 and 4 of Section 6755, Code of Alabama, 1923, place the direction and control of county property in the Court of County Commissioners, impose upon said Court the duty to see that janitors are provided for the courthouse, keep it in sanitary condition, and make it the duty of said court to examine, settle, and allow all accounts and claims chargeable against the County. Section 4866 makes it the duty of said court to enforce cleanliness in the jail, provide proper and separate bathing facilities for negroes and whites, provide soap and towels, hot and cold water, clean and sufficient bedding, etc. Section 4878 provides that the expense incident to the maintenance, sanitation, healthfulness and hygiene of each county jail shall be paid out of the funds of the county in which the institution is located.

Section 4865 requires the Court of County Commissioners, in April and October of each year, to fumigate and cleanse the jail. Under Section 4868, the Sheriff must keep the jail clean and sanitary. Under Section 4869 the Sheriff must fumigate any apartment of a jail in which has been confined a person with an infectious, contagious or communicable disease, and the expense for doing so must be paid out of the county funds. By Section 4876, it is made a misdemeanor for any member of the Court of County Commissioners, and the Sheriff, to violate any of the provisions of these sections of Article 4 of Chapter 165, Code of Alabama, 1923, with regard to any duty therein placed upon him. Again, your attention is invited to Section 209, placing the control of all **property** belonging to the County in the Court of County Commissioners.

By Section 210, it is provided that county buildings are to be **kept in order** at the expense of the County **under the direction** of the Court of County Commissioners, **which Court is authorized to make all the necessary contracts for that purpose**. By Section 211, it is made the duty of the Sheriff to keep the courthouse in order. By Section 220, it is made the duty of the Court of County Commissioners, upon assembling in special session, to make an **appropriation** of such an amount as may be necessary for the purposes expressed in subsection 1 of Section 231 of the Code, and for the payment thereof, the court must order the issuance of a warrant **payable to the sheriff**, which must be paid by the County Treasurer, on the presentation thereof, **"in preference and priority of all other claims."**

Amongst the things mentioned in subsection 1, of Section 231 referred to, appears this:

"Costs of heating the county jail in cold weather, of supplying it with wholesome water for drinking and bathing, of keeping it in a cleanly condition and free from offensive odors * * * *"

Section 221 provides that the appropriation required by Section 220 for the purposes mentioned in Subsection 1; of Section 231, **having been made by the Court of County Commissioners and the sheriff having received payment thereof**, it is his duty, **so far as such appropriation will enable him**, to keep the jail supplied with wholesome water for drinking and bathing, to keep drinking water accessible at all times to each prisoner, to keep it comfortably warm in cold weather, and at all times clean and free from offensive odors. Section 225 requires accounts to be properly itemized before passed upon and allowed by the Court of County Commissioners.

While Section 220, *supra*, deals only with special sessions it is evident that the Court has the same power to act in the same manner at regular sessions of said Court.

Throughout all these provisions of the Code you will observe that the control of county property is placed in the Court of County Commissioners; that the spirit and intent of the law is to vest that Court with the sole power to incur obligations against the County and the sole power to allow or disallow a purchase or a claim.

Therefore, if you wish to purchase things for use in keeping the **court-house** clean, you should apply to the **Court of County Commissioners**. In

keeping the jail in proper condition, you should apply to the Court of County Commissioners for a sufficient **appropriation** under Section 220, to be paid to you as prescribed in Section 221, for the purposes mentioned in subsection 1, of Section 231, and when this amount is paid over to you, it is your duty to do with it, the things mentioned in Section 221. The fact that the Judge of Probate has denied your claim does not mean **legally** that the Commissioners Court must deny it, but the practice of a county officer purchasing supplies without first consulting the Commissioners Court is contrary both to the law and to good business policy. No county officer has a right to bind the Commissioners Court to the payment for supplies he has purchased without consulting that Court. However, inasmuch as you state that these supplies were necessary, and it appears that they were used for legal purposes, you may now present the account to the Commissioners Court at its next session and that Court may or may not, whichever it choses, allow the claim.

When you, as Sheriff, appear before the Court of County Commissioners seeking an appropriation for the purposes mentioned in subsection 1 of Section 231, supra, the Court may require you to present evidence satisfactory to it that the amount asked by you for the particular purpose is necessary for the period of time which the requested appropriation is to cover. The Court may inquire into all specific items under the appropriation and may examine into proposed purchases, the prices or bids for all articles to be purchased with the appropriation asked, make a rule requiring the production by you of itemized, receipted bills for any and all expenditures of same when expended, and in allowing or disallowing claims or purchases, and in auditing accounts presented, said Court may do such things as are reasonably calculated to protect the County Treasury and safeguard against the useless expenditure of public funds.

To this end, said Court, in determining the necessity for a purchase or appropriation, may call before it to give information, such persons in the county as may, in its judgment, be expert or officially or otherwise sufficiently posted on the matters concerning the proposed purchase or purposes for which the appropriation is to be expended.

Of course the Court of County Commissioners has duties to perform as to County property as outlined hereinbefore and is vested with broad power in the exercise of its discretion as to the needs for purchases and appropriations for said purposes, yet it cannot arbitrarily and without just cause fail and refuse to perform its functions as to making necessary arrangements for the upkeep thereof as required by law. The Sheriff of a County is a sworn officer of the law and having definite duties to perform his recommendations pertaining thereto should not be lightly cast aside.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

The Court of County Commissioners,
Andalusia, Covington County, Ala.

Convicts—county convict not entitled to net earnings upon reversal of judgment where such convict was not worked by State Board of Administration.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of February 20, 1929.

You state that W. S. Teel was convicted of bastardy and sentenced to twelve months of hard labor; that after he had worked about five months his case was reversed and you have collected a certain sum of money representing his net earnings to the Horse Shoe Lumber Company.

You inquire whether or not you should pay to Teel the earnings you received from his labor.

I am of the opinion that you are without authority to pay the ex-convict his earnings.

The provision of statute that the earnings of a convict should be paid to him on reversal, under the Code of 1923, applies only to felony cases. Under the Act of 1927 it applies only where county convicts have by contract been turned over to the State to work under the Board of Administration.

Section 3672, Code 1923, (General Acts 1927, p. 53).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1929.

The Clerk of the Circuit Court,
Carrollton, Pickens County, Ala.

Preliminary proceedings—on final conviction. Defendant not chargeable with solicitor's, judge's and clerk's fees of said preliminary investigation.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 22, 1929. In it you state that many felony cases are tried before the county court preliminarily, and bound over to the circuit court; that the grand jury indicts the defendants, and they are permitted to plead guilty to an attempt to distill and are fined.

You request my opinion:

Would it be proper for me to charge the defendant a solicitor's fee, judge's fee, and clerk's and sheriff's fee for the trial in the county court as well as in the circuit court?

It would not except as is provided by Section 3755, Code of Alabama, 1923, and only as to the fees provided therein. This Section provides that the committing magistrate and constable on preliminary trials, both together, may receive costs up to the amount of ten dollars, but the committing magistrate shall receive no pay unless he reduces evidence of State's witnesses to writing, as required by law. Outside of this no fees arising out of the preliminary examination can be charged.

The Judge of Probate as ex-officio judge of the county court, while presiding at a preliminary hearing, acts as a committing magistrate and is bound by the statutes pertaining to preliminary proceedings.

Opinions Attorney General 1922-24, p. 130.
State v. Humphrey, 125 Ala. 110.

The complaint in preliminary investigations must be made before a magistrate.

Section 5217, Code of Alabama, 1923.

Section 5136, Code of Alabama, 1923, sets out who are magistrates, and among others names the judge of probate and judge of the county courts of the various counties and designates them as such.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Tax Assessor,
Ashville, St. Clair County, Alabama.

Tax Assessor—Commissioners Court to furnish typewriter and telephone for office of.

Tax Collector—Commissioners Court to furnish typewriter and telephone for office of.

Court of County Commissioners—to furnish typewriters and telephones for Tax Assessor and Tax Collector.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 29, 1929. In it you request my opinion:

Is it the duty of the Court of County Commissioners to furnish the Tax Assessor and Tax Collector each with a typewriter and telephone for their respective offices?

In answer will state that it is. Your attention is invited to subsection 16 of Section 6755 relating to the telephones and to Section 9604, Code of Alabama, 1923, as amended by an Act approved September 6, 1927, (General Acts, 1927, p. 693) as to the typewriters. A typewriter has been held to be "stationery" by the Supreme Court. You will note that telephones are referred to in the **last mentioned section** also.

Opinions of Attorney General, 1910-1912, p. 220.
Opinions of Attorney General, 1926-28, p. 565, 567.
144 Ala. 505,
203 Ala. 128.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

Clerk of the Circuit Court,
Abbeville, Henry County, Alabama.

Trial Tax: No trial tax where defendant sentenced to penitentiary, and execution issued against defendant and returned "no property found."

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of May 13, 1929.

You request my opinion:

Does the State pay trial tax where parties are sentenced to the penitentiary, and if not how is the tax collected?

I presume from your inquiry you intend to convey the meaning that in the event parties are sentenced to the penitentiary, is the State trial tax paid out of the convict fund, or is the tax paid from the fine and forfeiture fund.

Answering your inquiry I am of opinion that in the event defendant is sentenced to the penitentiary this tax is not a charge against the convict fund nor is the tax paid from the fine and forfeiture fund.

Section 4½ of an Act approved September 15, 1919 (Acts 1919, p. 284) provides as follows:

"Section 4½. That a trial tax of three dollars be, and the same hereby is, imposed in each case, civil, criminal and equity, which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court, into the general funds of the State treasury."

This section has not been repealed.

Op. Atty. Gen. 1926-28, p. 577.

Section 3 of Act approved August 17, 1923, (Acts 1923, p. 127).

Section 3667, Code of Alabama, 1923, provides for the payment of certain items of cost from the convict fund in penitentiary cases, but the State trial tax is not included among these items. Therefore, there is no provision of law for the payment of the trial tax in penitentiary cases by the State. However if execution must be issued under Section 3741, of the Code, which provides, among other things, that the clerk shall tax costs and issue execution immediately upon the adjournment of court and if collected it should be paid by the Clerk into the State Treasury. Under the terms of Section 4½ of an Act approved September 15, 1919, supra, it is, of course the duty of the clerk to tax and collect the trial tax the same as other costs, but this does not mean that the trial tax shall be paid from the convict fund in the event the defendant is sentenced to the penitentiary, nor does it mean that this tax shall be paid from the fine and forfeiture fund, after execution has been issued against the defendant, and returned "no property found."

Report Attorney General, 1918-20, p. 307.

Section 3 of an Act approved February 18, 1927, (Acts 1927, p. 46) provides that no fees of a circuit solicitor or trial tax whether heretofore accrued or hereafter accruing, shall be taxed against or paid out of the fine and forfeiture funds of any county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

Deputy Solicitor,
Tuscumbia, Colbert County, Ala.

Justice of the Peace—fees not paid from fine and forfeiture fund.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 18, 1929. You state that a justice of the peace had insolvent cost due him in cases where the State failed to convict and his term of office expired before he collected said amount.

You request my opinion:

Can the justice of the peace who succeeds the one referred to above, apply fines which he collects to the payment of the above claim?

In my opinion a justice of the peace cannot pay the costs due his predecessor in office from fines collected by the justice of the peace who succeeds to the office.

Section 4039, Code of Alabama, 1923, as amended by an Act approved February 18, 1927, (General Acts 1927, p. 45) contains the provision that whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury, above the sum required to pay the registered

claims of the State witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted, etc.

You will observe that the above Section 4039 as amended by the Act approved February 18, 1927, provides for payment of the fees of the officers of the court. I rendered an opinion on August 17, 1928, to the County Depository of Escambia County (Op. Atty. Gen. Vol. 7, p. 41, Office Edition) in which I held that fees of a justice of the peace cannot be paid from the fine and forfeiture because he is not an "officer of the court" within the contemplation of Section 4039, Code of Alabama, 1923, as amended by the Act approved February 18, 1927, which I have referred to above. I am enclosing copy of such opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Judge of Probate,
Clanton, Chilton County, Alabama.

Licenses—Lumber and timber dealers.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of March 23, 1929. You state that a certain lumber company is operating a lumber business in the Town of Clanton, Chilton County, Alabama, in the following manner, viz: said company buys growing timber and then enters into a contract with saw mills to have this timber sawed into rough lumber, which rough lumber is brought to the yard of said lumber company at Clanton, where the lumber is planed, dressed and resized into proper dimensions for shipment, and then said company sells and ships said lumber. Also, said company buys rough lumber of various dimensions and sizes from small mills and then runs the same through its planing mill, preparatory to a sale thereof. All of said lumber and timber purchased by said company is never sold by said company, except as it is reshaped, resized and finished, by running the same through the company's planing mill which is situated on the lumber yard thereof. None of the lumber or timber purchased by said company is sold until it is put through the process above described. You further state that attached to said planing mill is a cut-off saw, which is used in making uniform the length of the lumber.

You request my opinion:

What is the appropriate license fee which said company so operating should pay?

In answer to your inquiry, it is my opinion that, under the facts stated by you, said company should pay the license required under Schedule 126 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 438).

There is no license due for the operation of a planing mill alone and of itself.

Opinion Attorney General, 1928, Vol. 5, p. 71 (Office Edition).

Opinion Attorney General, 1928, Vol. 7, p. 15, (Office Edition).

In view of the fact that Schedule 126, cited supra, levies an equal tax on wholesale dealers, jobbers, etc., it is not necessary to catalogue or classify the activity of the company here considered.

Since you have mentioned the case of *Nash v. State*, 110 So. p. 797, as being pertinent to your inquiry, I quote the following excerpt from an opinion heretofore rendered by this office, which explains my position with reference to said *Nash* case:

"In my opinion, a saw mill license is not required for operating a planing mill; nor is a wholesale lumber dealer's license required where the only lumber sold is the product of the seller's own saw mill. To be a dealer in lumber, one must buy and sell lumber. But, in my opinion, where one buys lumber in the rough, then dresses, or planes it and sells it, he is a lumber dealer, and if he sells, at wholesale, to purchasers within the state, he is a wholesale lumber dealer within the meaning of Schedule 126 of the Revenue Act, 1919, although he changes somewhat the condition of the lumber after buying and before selling it. He is, in my opinion, both a buyer and seller of lumber, and, therefore, a lumber leader. A man may buy poor cattle, then fatten and sell them; and, the fact that he has changed their condition before selling, does not keep him from being a cattle dealer. But should he buy and kill and sell the beef, he is not, in my opinion, a cattle dealer in the sense of the word 'dealer' is used in the statute.

"I differ from the decision by the Court of Appeals in the case of *Nash v. State* to the extent indicated. Planing mills do not convert lumber into something other than lumber. They do not manufacture anything. They simply improve the condition of the lumber. The planer does not manufacture lumber. The lumber is manufactured by the saw mill. Its condition is improved by the planer.

"As to a lumber yard, it is my opinion a person may operate a lumber yard in selling lumber manufactured by himself as well as in selling lumber bought by him from another. The source of the lumber is, in my opinion, immaterial. The manner and place of keeping the lumber for sale determines the question as to license for lumber yard."

Biennial Report of Attorney General, 1926-28, p. 498.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Clerk of the Circuit Court,
Oneonta, Blount County, Alabama.

Motor vehicles—operating with replaced tags—fines not paid into
State Treasury.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 12, 1928, and also your letter of May 19, 1928. (Opinion Request No. 66). In these letters, which were misplaced, you state that under date of April 2, 1928, you remitted to the State Highway Department fines in the amount of \$67.50, covering convictions in the County Court of Blount County, for the offense of "operating a motor vehicle upon a public highway with a replaced tag." These fines were in the cases of State v. C. E. Mason and State v. H. W. Watts, on complaints sworn out February 6, 1928 and February 27, 1928, respectively and on pleas of guilty entered March 5, 1928, and February 27, 1928, respectively. You further state that since making the remittance you are in doubt as to whether or not the State Highway Department is entitled to said fines assessed on the above convictions. Upon this statement of facts you request my opinion:

Should I have remitted the fines in the above mentioned cases to the State Treasurer to be credited to the State Highway Department?

In answer will state that you should not have remitted said fines to the State Treasurer to be credited to the State Highway Department. In stating this as my opinion I assume that the defendants were charged with and convicted of a violation of Section 24 of an Act approved September 13, 1923, (General Act 1923, p. 292) which makes it a misdemeanor for anyone to use upon any motor vehicle an old or replaced tag, and sets the fine at twice the amount of the license required for the motor vehicle upon which the tag is used, and further makes it mandatory that the defendant procure a license for the vehicle.

You will observe by a careful reading of said Section 24 that where one has lost, mutilated or destroyed his automobile license tag, upon the payment of \$1.00 to the State Tax Commission, and the making of a proper affidavit, he may have a replacement tag issued for the lost, mutilated or destroyed tag. Then, if the replacement tag be issued in lieu of a lost tag and the lost tag reappear and come into the owner's possession, it is his duty to forward said tag, which is termed "old tag" or "replaced tag," to the State Tax Commission. If he, or anyone else, uses the old or replaced tag on his motor vehicle, he commits a misdemeanor, as set forth above.

Section 81 of an Act approved August 23, 1927, denominated "The Alabama Highway Code," which, in fact, is not a Code, but which is an Act of the Legislature, has no bearing on your question.

Of course, where one is charged specifically with a violation of Section 81 of said Act approved August 23, 1927, and convicted, the fine, on con-

viction, is paid into the State Treasury to the credit of the funds of the State Highway Department for the maintenance of roads and bridges, as provided by Section 106 of said Act.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Tax Collector,
Athens, Limestone County, Ala.

Tax Collectors—collection of taxes should be made in regular way prescribed by law, notwithstanding bankruptcy of owner.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 9, 1929, in which you state as follows:

"I have on my books unpaid taxes on real estate and personal property in the name of L. D. Coffman, who at the time of the assessment, and until sometime the latter part of the year or the early part of this year was engaged in the mercantile business in connection with his farming, and who is now in bankruptcy, a receiver having been appointed some time the latter part of 1926.

"Upon learning of the situation, recently, I made out a bill for the taxes for 1926, and also for 1927, (the land being assessed again in Coffman's name for 1927 taxes) and presented the bill to the receiver who in turn forwarded same to the Referee in Bankruptcy, Hon. Jere Murphy, Huntsville, Alabama, who in reply advised the Receiver not to pay the taxes, if I understand his letter correctly.

"The Receiver advises me that there was no personal property turned over to him as receiver in the matter and that the real estate is all the assets, and that is heavily mortgaged.

"In Mr. Murphy's letter to him he mentions an amendment to the Bankrupt Law which went into effect in August last year providing that taxes should be paid only on any Equity there might be over and above the mortgage."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

What are my duties as Tax Collector in collecting this tax under the above statement of facts?

I am of the opinion that the failure of the receiver in bankruptcy to pay the taxes you described does not interfere with you proceeding in the regular way prescribed by law for the collection of taxes. I would suggest that

you notify the person holding the mortgage on said property, as it seems to me he would be vitally interested in protecting his interest against a tax sale. He would probably pay the taxes or buy the property in under the tax sale.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The State Prison Inspector,
CAPITOL.

Prisons and prisoners—persons convicted for violation of city ordinances in recorder's court not committed to county jail except where arrangements is made as contemplated in Section 2317, Code of Alabama, 1923.

Opinion by the Attorney General

Dear Sir:

I have your letter of June 1, 1929 with copy of a letter from the Mayor of Linden, Marengo County, Alabama.

You request my opinion:

Is the sheriff authorized to allow persons who have been convicted in the Recorder's Court of Linden, Marengo County, Alabama, for violation of municipal ordinances, to be incarcerated in the county jail?

In answer will state that he is not.

Your attention is invited to Section 2317, Code of Alabama, 1923, which is as follows:

"2317. CITIES MAY CONTRACT TO USE PARTS OF COURTHOUSE AND JAIL.—Municipal corporations in this state may contract with boards of revenue or commissioners courts for the use and occupation of parts of courthouses and jails held and owned by the county, located in their municipalities, and any contract made and entered into between the authorities of the municipality and the county shall be binding upon both the municipality and county until revoked by the joint agreement and action of both parties to the contract. Any and all easements granted to municipalities by the county authorities for the use and occupation of parts of courthouses and jails located in the municipalities shall be in every respect binding between the parties."

Where the Town of Linden has entered into a contract with the court of county commissioners of Marengo County, in accord with Section 2317, *supra*, then such prisoners may be committed to that part of the county jail used and occupied under the contract by the City, which part of said county jail becomes the city jail.

Since the request for the opinion deals solely with the question as to persons convicted of violating a municipal ordinance, I have not dealt with the matter of the disposition of defendants in recorders courts who are charged with violation of State laws.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Sheriff,
Geneva, Geneva County, Alabama.

Sheriff—Fee in Justice Court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 6, 1929, in which you state you arrested a man for public drunkenness in a certain beat in the county, and the case was made returnable to the Justice Court of that beat, and there is a bonded bailiff in that beat.

You request my opinion:

Can the Sheriff, under the circumstances stated above, claim the fees for making the arrest?

I am of the opinion the sheriff would be entitled to the arresting fee under the facts stated.

It is true the bailiff has jurisdiction in his beat but not exclusive jurisdiction. The sheriff has jurisdiction throughout the county in all criminal matters, and if he makes an arrest, even though the case is finally disposed of in the Justice Court, he would be entitled to the fee.

Section 10189, Code of Alabama, 1923, makes it the duty of the sheriffs in their respective counties to ferret out crime, and to apprehend criminals, and when they perform this service they are entitled to the fees for same.

Section 3741, Code of Alabama, 1923, fixes the fees of sheriffs in criminal cases, which is in part as follows:

" * * * Sheriffs are entitled to the following fees and allowances in criminal cases—that is to say: For executing a writ of arrest in misdemeanor cases—\$2.00 * * *."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Superintendent of Education,
Moulton, Lawrence County, Alabama.

Schools—Control by County Board of Education of district school property.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 8, 1929. You state that the Town Creek School District was made a special school district in 1901, (Acts of Alabama 1900-1901, p. 1662) and that in 1919 an Act was passed (Local Acts 1919, p. 58) which authorized W. J. Lee, E. E. Etheredge, R. N. Streater and their successors in office, as trustees of Town Creek Public School District No. 59 to borrow money and execute a mortgage on certain land. You also state that the money was borrowed as provided by said Act. You further state that an Act was passed in 1923, (General Acts 1923, p. 751) which authorized an amendment to the Constitution of Alabama which amendment would give Town Creek School District No. 59 the right and power by vote of a majority of the qualified electors of such district, at an election held for that purpose to levy and collect for the purpose of acquiring, constructing or repairing of school buildings in such district or paying for school buildings already built, a tax of not over five mills in any one year.

You request my opinion:

Is it necessary for the Trustees of Town Creek School No. 59, Lawrence County, to convey the property which they hold as trustees, to the County Board of Education before the proceeds of five mill school taxes can be used to pay indebtedness which is charged against said property?

In my opinion it is not necessary for the trustees to make the conveyance referred to above. However, in my opinion it would be advisable for the Trustees to make such conveyance and have the conveyance recite that the County Board of Education assumes all indebtedness against the property conveyed.

I have made a careful examination of the Acts of Alabama enumerated above and I find that said Acts gave the trustees control of the property of Town Creek School District No. 59 and that the Act of October 1, 1923, (General Acts 1923, p. 751) provided for an amendment to the Constitution of Alabama which would give Town Creek School District No. 59, Landersville School District No. 23, and Moulton School District No. 28 in Lawrence County, Alabama, the right to collect a tax of not over five mills for the purpose of acquiring, constructing or repairing school buildings. An Act approved February 15, 1927, (General Acts 1927, p. 49) gives the County Board of Education control of such tax, and also gives the County Board of Education authority to issue warrants against the income from said tax.

Section 95, School Code, 1927, provides that all property, vested by law in the public school authorities of any county for the benefit of the public schools of any county is transferred and vested in the County Board of Edu-

cation and their successors in office. Said section contains the further provision that real and personal property of any county, school district or public school shall be held in trust by the County Board of Education for the benefit of any such county school district or public school. This clearly shows that the property of Town Creek School District No. 59 is to be under the control of the County Board of Education. Said Section 95 repealed the above local laws because said local laws conflict with said section 95 in that they gave the trustees and not the County Board of Education control of the property of Town Creek School District No. 59. The Legislature recognized this fact when it enacted the Act of February 15, 1927, and gave the County Board of Education the right to issue warrants against the income from the five mill tax in Town Creek School District No. 59.

I rendered you an opinion on March 17, 1927, (Opinions Attorney General, Vol. 1, p. 382, office edition) in which I held that the title to school property which was conveyed to the local trustees in the Moulton School District No. 28 was vested in the County Board of Education under Section 85, School Code 1924. Moulton School District No. 28 was included in the Act of 1923, (General Acts of 1923, p. 751) which gave Town Creek School District No. 59 the right to levy a school tax of not over five mills. Section 85 School Code, 1924, contains provisions similar to the provisions of Section 95, School Code 1927, referred to above. You will observe, however, that the provisions of said Section 95 are more specific than the provisions of Section 85, School Code, 1924. Said Section 95 expressly provides that property of all school districts shall be held in trust by the County Board of Education for such districts.

I rendered an opinion on October 18, 1927, to Hon. R. E. Tidwell, State Superintendent of Education (Op. Atty. Gen'l. Vol. 3, p. 262, Office Edition) in which I held that the Act adopting the School Code of 1927, (General Acts 1927, p. 483) showed the legislative intent to repeal by implication all laws in conflict with said Code, including local laws except those mentioned therein as not repealed.

Opinion May 18, 1928, Superintendent of Education, St. Clair County.

As I have already shown above, Section 85, School Code, 1924, and Section 95, School Code, 1927, divested school trustees of the control of school property and placed such property under the control of the County Board of Education. In my opinion, as I have already stated, the provisions of said section give the control of such property to the County Board of Education, thereby making it unnecessary for the Trustees of each school district or public school to execute a deed conveying such property to the County Board of Education, but such deed can be executed without violating any provision of law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 6, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

License—for sale of perishable produce from railway cars—Section 7½ of an Act approved July 22, 1927, (General Acts 1927, p. 154) construed.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 22, 1929, inviting my attention to Section 7½ of Act, supra, levying a license on persons engaged in selling perishable produce from railway cars in cities and towns in Alabama. You state there is no license in this State levied on jobbers, wholesalers or brokers dealing in fruit and vegetables as such, and, therefore, if reference in said Section 7½ is had to State license the exemption found in the next to the last proviso in said section is without application or meaning. You invite attention to that proviso in said section exempting from the payment of said license merchants with regular established places of business, who have paid licenses as such merchants. You request my opinion:

1. Does the provision of said Section exempting from payment of said license, jobbers, wholesalers and brokers, only apply in each city where such city license is taken out?

2. If so, is the exemption granted only when the city license is specifically levied on a jobber, wholesaler or broker in the articles mentioned in said Section 7½?

3. Referring to that provision exempting merchants from said license does said exemption apply regardless of type of city license the city merchant has obtained, or does said exemption apply only where the merchant has taken out a city license to deal in the particular articles mentioned in said schedule?"

In answer to all of your questions will state that Section 7½ applies to persons, etc., engaging in selling at wholesale or retail, fruits, vegetables and other **perishable** commodities, from railway cars standing on side tracks, spur tracks or unloading tracks. The license must be paid in each city or town in which such business is carried on and on each car in which, or at which such business is conducted. The evidence of the license must be posted conspicuously on the car. If the articles sold or to be sold are removed from a car and placed in another car from which sales have **already** been made, a license must be obtained **on each such transfer**. The license to engage in selling applies to all cars of fruit, vegetables, produce and other like **perishable** commodities shipped in carload lots, or less, **to be sold from the car**, at wholesale or retail, when same are delivered to **consignee**. The car cannot be legally opened **for the purpose of making such sales** until the license has been paid.

This Schedule applies to all persons, firms, corporations or associations, whether principal or agent, engaging in selling such articles from the places

named, and in the manner stated, except that the Schedule does not apply to jobbers, wholesalers or brokers who are regularly licensed in the city, under the city license Schedule, to engage in jobbing, wholesaling or being brokers of articles of the kind on which Section 7½ imposes a license. It does not apply to a person engaged in selling farm products or produce raised by himself. It does not apply to a merchant having a regularly established place of business in the town or city in which the car is located on the track and who has taken out license to conduct the business of a merchant **selling articles of the kind mentioned in said section.**

There being no State license covering a wholesaler, jobber or broker in the kind of articles named, clearly the section refers to city or town licenses on such businesses. The same reasoning applies to merchants.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 7, 1929.

The State Tax Commission,
CAPITOL.

License: Fruit peddler required to pay peddler's license for each wagon in each county.

Opinion by Assistant Attorney General Cobb.
Attention: Mr. L. H. Brassell, Associate Member.

Dear Sir:

I have your letter of April 25, 1929.

You make the following inquiry and request my opinion:

Is a fruit peddler's license under Schedule 56, Revenue Act. 1919, required in each county in which fruit is peddled or does one license entitle the holder to peddle fruit in any county of the State?

I am of the opinion that a fruit peddler from a wagon is required to take out a license of fifteen dollars for each wagon in each and every county in the State where he engages in the business of peddling.

Schedule 56 of Section 361 of an Act approved September 15, 1919 (Acts 1919, p. 412) reads as follows:

"Schedule 56. FRUIT PEDDLERS.—For each person engaged in the business of peddling fruit from a wagon, fifteen dollars for each wagon; provided this license shall not be required of any person selling fruit grown by him in this State."

Section 363 of the same Act provides among other things as follows:

"Before any person, firm or corporation shall engage in or carry on any business or do any act for which a license by law is required, he,

they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, the amount required for such license * * *."

Construing Schedule 56 and Section 363, supra, together, I am of opinion that a fruit peddler should pay to the judge of probate of each county in which he peddles, the sum of fifteen dollars:

The exemption provided for in the latter half of Schedule 56, supra, applies not only to persons selling fruit grown by him in this State, but also applies to any person selling fruit grown by him anywhere.

No state, either in the exercise of its taxing power, or of its police power, can discriminate in favor of its own products and manufactures, and against the products and manufactures of other states.

Vines v. The State of Alabama, 67 Ala. 73.

Powell v. State, 69 Ala. 13.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 7, 1929.

The Judge of Probate,
Heflin, Cleburne County, Alabama.

Court of County Commissioners—Should not pay Road Supervisor, Cleburne County from gasoline fund: Should pay claim for maintenance and repair of roads from gasoline fund: Should not pay claim for work on roads unless authorized by Commissioners' Court: Should not pay for work on road from gasoline fund under minute order submitted.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

Further referring to your letter of February 2, 1929, and the opinion rendered February 8, 1929, in answer thereto, you are advised that said opinion is hereby overruled and withdrawn.

In your letter of February 2, 1929, you state that Cleburne County has no funds with which to pay a road supervisor or to pay commissioners for looking after and inspecting the roads and road work, unless he can be paid for such services from the excise tax on gasoline received by your county from the State.

You request my opinion:

(1) Is the salary of the Road Supervisor for Cleburne County, Alabama, payable out of the Gasoline Road Fund Tax, derived by said County from the State under Section 83, Act approved Aug. 22, 1923 (General Acts, 1923, p. 197)?

(2) Will I be protected in paying a claim that has been allowed and passed by the commissioners court for work on the roads at a time when we had no Road Supervisor for Cleburne County, Alabama, where the claim was properly presented and for honest labor performed in **repairing** roads. The work was performed and claim presented and allowed **since** passage of a Local Act approved Aug. 22, 1927, (Local Acts 1927, p. 238).

(3) At a time when we had no Road Supervisor for Cleburne County, Alabama, but **since** the passage of said Local Act, one of the Commissioners, **without any previous order or minutes** of the Court, employed a competent person to **repair** a part of a road. At the next meeting the claim for services was properly presented and allowed by the Court. Is it my duty and is it legal for me to pay it out of the gasoline fund and will I be protected in doing so?

(4) **Under the exact circumstances** as outlined in question three, one Commissioner employed one person to **repair** a few miles of road with the County road equipment at a salary of \$2.50 per day and told this person to employ all others that he might need to properly use the equipment, and all others would receive \$2.00 per day. The one employed originally employed six others at \$2.00 per day, one of which was a nephew of the commissioner. The only originally employed by this commissioner presented a sworn and itemized claim at a regular meeting of the court. It was allowed and passed, and I was ordered to pay same with warrant out of the gasoline fund. Said bill amounted to more than \$250.00. Must I pay the bill as directed?

(5) **Under the exact circumstances** as outlined in question four, one was presented and ordered paid that was for the sum of \$80.00. Must I pay it?

(6) Where there are minutes of the Court of County Commissioners, as outlined hereinafter, in reference to each commissioner of the court covering the several beats of the county, and the claims are presented, passed and allowed, must I pay them out of the gasoline funds received from the State?

The minutes referred to read as follows:

"Commissioner Roy Starr is hereby ordered and directed to inspect all road and bridge work being done by the Road Supervisor of Cleburne County, Alabama, in Beats 4 and 6 and 15 of Cleburne County, Alabama, and inspect the roads and bridges in said beats. He must spend at least two days each week in person in the performance of said duties and shall perform no other duties except this road duty during said time and make a report to this court of the conditions of the roads and bridges and the kind of work being done by said Supervisor, together with his recommendations at the next meeting, and in the event he should think it best to change the method of road work and change the location of any road that needs immediate attention, he shall notify all commissioners, said Roy Starr shall receive as pay therefor the sum of three

dollars per day for each day's work and five cents per mile for each mile traveled in the discharge of his duties, but shall receive no pay for any work in excess of two days per week and shall not receive any pay for mileage traveled except in beats above named and no pay for traveling over the same road but one time in one week; payment to said Roy Starr for said services to be made out of the Gasoline Road Fund Tax derived by Cleburne County, Alabama, from the State Tax, after the claim has been presented as other claims for labor and material are presented and allowed."

The answer to your first inquiry is in the negative. Section 83 of an Act approved August 22, 1923, (General Acts, 1923, p. 197), *supra*, provides that all of the funds derived by the several counties from the excise tax on gasoline shall be expended **exclusively** for **maintenance** and **repair** of roads, highways and bridges in said county. The Road Supervisor of your county, under Section 2 of the Local Act, *supra*, creating the place, among other things is required to supervise and care for the **construction** of the county public roads and bridges. Your county cannot legally expend said excise tax for expenses pertaining to the **construction** of those roads and bridges. The salary should be paid from the county general fund.

The answer to your second question is in the affirmative. The manner of operation prescribed in said Local Act cannot become effective until the appointment of a Road Supervisor in the manner and as provided therein. The Act prescribes the Court of County Commissioners **shall** appoint a Road Supervisor and failing to do so, the **Governor** shall appoint one under conditions stated in said Act. Mandamus will lie against the Court or the Governor to compel obedience to the statute. Until compliance therewith, however, the Court of County Commissioners operate under the law otherwise existing. However, upon the appointment and qualification of the Road Supervisor, the *modus operandi* must be as set forth in said Local Act as to the matters covered by it, and cannot be otherwise.

In answer to your third question will state that no one has authority to bind the county to the payment of a claim except where previously authorized and ordered by the Court of County Commissioners, which fact should appear as a matter of record in the minutes of said Court. However, where as in this case, the Court later met and at such meeting the claim for the services was **properly** presented and was allowed by said Court, then if the minutes of said Court at said later meeting fully set forth the facts together with the facts showing proper presentation, auditing and allowance, such will be considered as a determination by said Court that the claim was just and proper. The County having received the benefit, though not bound in law through the Commissioners Court to allow said claim, yet said Court may, if it deems proper, authorize the payment of such an amount as it considers the services reasonably worth, and by complete and proper minutes of its actions order the payment thereof.

In answer to your fourth question, the reasoning set forth immediately above in my answer to your third question applies, except that payment cannot be made as to the nephew of the Commissioner.

See Section 5076, Code of Alabama, 1923.

In answer to your fifth question see my answers to your third and fourth questions.

The answer to your sixth question is in the negative. The order set out in the minutes as hereinabove quoted conflicts with Section 231 and 6771, Code of Alabama, 1923. Section 6771, *supra*, provides, among other things, that each member of the Court of County Commissioners in each of the several counties of the State of Alabama shall be paid out of the County Treasury of their respective counties for their services the sum of three dollars per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building, or repairing any county bridges, county buildings or works, and five cents per mile for each mile necessarily traveled by them in so doing, said sum to be paid on warrants drawn on the County Treasurer on the order of the Court of County Commissioners or Board of Revenue. No allowance can legally be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., **except when acting under the authority of an order of the Commissioner's Court, previously made.**

I construe this section to mean that each member of the Court of County Commissioners shall be paid out of the general fund of the county for his services not only while in the discharge of his duties as such member, but also while occupied in the discharge of his duties, in inspecting roads, bridges, etc. The minute order hereinabove quoted provides, among other things, that the Commissioner shall be paid out of the **"gasoline road fund** (meaning the excise tax) for his services in inspecting road and bridge work done by the Road Supervisor of Cleburne County. The minute order is in direct conflict with Section 6771, *supra*. Section 231, *supra*, provides in part as follows:

"The following claims are declared to be preferred claims against the county, and they shall be given priority in the order named. * * *

4. Compensation of the members of the court of county commissioners or boards of revenue * * *. For the payment of the above recited claims, in the order named, it shall be the duty of the county treasurer or custodian of the county funds to set apart a sufficient fund from the **moneys of the county**, and he and his official bond shall be held liable for a failure so to do, in so far as the funds of the county make it possible for him so to do."

I am, therefore, of the opinion that Sections 231 and 6771 of the Code, *supra*, require that the members of the Court of County Commissioners shall be paid for all services from the general fund of the county, and that they cannot be paid for any services from the gasoline tax received by Cleburne County from the State.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

June 8, 1929.

The Judge of Probate,
Luverne; Crenshaw County, Ala.

Mortgage Filing Tax—no mortgage tax to be collected on mortgages given to the Secretary of Agriculture for and on behalf of the United States.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 20, 1929, in which you request the opinion of the Attorney General on the following question of law:

Should the Judge of Probate collect a mortgage tax on Federal Crop Mortgages given to the Secretary of Agriculture and on behalf of the United States of America, when filed for record?

I am of the opinion that no mortgage filing tax is due on a mortgage made to the Secretary of Agriculture for and on behalf of the United States, when same is filed for record.

Opinions of Attorney General, 1926-28, p. 410.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 8, 1929.

The Chairman,
State Tax Commission,
Montgomery, Alabama.

Licenses—counties cannot collect licenses from electric public utilities.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 20, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not county licenses should be collected from electric public utilities under Schedule 89, Acts 1919, and Section 24, Revenue Acts, 1927, p. 165?

I have examined both the Sections referred to in your inquiry, and am of the opinion that both of these Sections cover license on electric public utilities, and the Sections in each Act expressly provide that "but no license under this Schedule shall be paid to the county or counties." This clause

appears in each one of the Sections referred to, and I am of the opinion that it was the manifest intention of the legislature to exclude the counties from collecting a license tax from electric public utilities in this State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 10, 1929.

Chairman, State Tax Commission,
Montgomery, Alabama.

Taxation—Exemption—Property of World War Veterans—property in hand or invested by guardians received from United States under Section 454 and Section 306 United States Code Vol. 38, is exempt from taxation in Alabama.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of May 20, 1929, in which you request the opinion of the Attorney General on the following question of law:

“Whether the funds, or estates—whether existing as real or personal property, whether invested, loaned or held in cash, by the guardians—derived from funds received as benefits under the two acts of Congress known as the World War Veterans Act of 1924 and the World War Adjusted Compensation Act, while in the hands of the guardians, are subject to taxation by the State of Alabama, or whether, on the other hand, they are in their entirety wholly exempt from taxation under the statutes quoted above?”

There is no statute in Alabama which exempts from taxation the property described, and held by guardians of World War Veterans, received as benefits from the United States under the two Acts of Congress, 1924, known as the World War Adjusted Compensation Act and the World War Veterans Act. Therefore, any exemption that would cover this class of property belonging to World War Veterans and paid to guardians for their use and benefit by the United States Government would be governed by the term of the Acts of Congress making the appropriation, governing its expenditure, and providing an exemption from taxation. Section 22 of the World War Veterans Act (38 U. S. C., Section 454) reads as follows:

“This the compensation, insurance, and maintenance and support allowed under Title 2, 3 and 4, respectively, shall not be assignable; shall not be subject to the claims of conditions of any person to whom an award is made under Title 2, 3, or 4; and shall be **exempt from all taxation** * * *”

And Section 308 of the World War Adjusted Compensation Act, as amended, (38 U. S. C. Section 618), reads in part as follows:

"No sum payable under this Act to a Veteran or his dependents, or to his estate, or to any beneficiary under Title 5, no adjusted service certificate, and no proceeds of any loan made on such certificate shall be subject to attachment, levy or seizure under any legal or equitable process or to **National or State** taxation * * *

I am of the opinion from a reading of the exemption clause contained in the two foregoing statutes, that it was the manifest purpose of the legislature making provision for World War Veterans to devote the benefactions there provided to the sole use of the beneficiaries and that the same should not be subject to taxation by the United States or the States.

These Federal statutes provide that gratuities in question shall be exempt from all taxation. There can be no doubt that the language of the two Acts mean what is said in providing "shall be exempt from all taxation."

In the case of the Tax Commission of Ohio v. Rife, et al. 119 Ohio S. 43, decided June 15, 1928, says:

"The provision of Section 22 of the Act of June 7, 1924, providing for exemption from taxation, must dominate over the succession tax statute of Ohio because of the provision of paragraph 2. Article 6 of the United States Constitution, providing that:

"This Constitution, and the laws of the United States which shall be made in pursuant thereof * * * shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

United States v. Hall, 98 U. S. 343;

Wilson v. Sawyer, Arkansas—6 S. W. (2d) 825; 28 C. J. p. 187.

Payne v. Jordan, 36 Ga. App. 787, 138 S. R. 262.

Succession of Geir, 155 La. 167.

Having given consideration to the foregoing Federal Statutes and the cases herein cited, it is my opinion that the funds received by guardians for the use and benefit of their wards under the two above cited Sections of the United States Code, held by said guardians, or deposited, or invested by them in securities or real estate, are exempt from taxation in Alabama, as provided in said Statutes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 10, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Commissions—clerk of circuit court, as an ex officio clerk of county Court is entitled to five per cent commission on solicitor's fees collected in county court.

Courts—circuit clerk as ex officio clerk of county court entitled to five per cent commission on solicitor's fees collected in county court.

Fees—solicitors—county court—circuit clerk as ex officio clerk of county court entitled to five per cent commission on solicitor's fees collected in.

Opinion by the Attorney General.

Dear Sir:

I refer to your letter of July 20, 1928, and to an opinion rendered in answer thereton on July 25, 1928, (Vol. 6, office edition, p. 327). In your letter you state that an Examiner of Accounts in making an investigation of the records and accounts of certain officers of Lee County, Alabama, advises that the clerk of the circuit court, who is ex officio clerk of the county court, takes the position that he is entitled to commissions on county court costs and solicitor's fees in the county court which come into his hands on executions or otherwise, and which are paid by him into the county treasury. Said clerk claims he is entitled to retain five per cent commissions when he pays such monies over to the county treasurer.

You request my opinion:

Is the clerk of a circuit court, as ex officio clerk of the county court, entitled to retain five per cent commissions on county court solicitor's fees collected by him when he pays said fees into the county treasury?

In answer will state that he is.

On July 25, 1928, Assistant Attorney General Knight rendered an opinion to you in answer to your said letter of July 20, 1928, in which it was held that, in view of the provisions of Sections 3734, 3758, 5512 and 5518, the clerk was not entitled to said commissions, and he stated in said opinion that the former opinions of this office, viz, Opinions Attorney General, 1918-20, p. 499, 1924-26, p. 33-120, and an opinion of March 15, 1928, to the circuit clerk of Autauga County, (Vol. 5, office edition, p. 61), did not appear to have treated the subject from his point of view, which was that the services of the circuit clerk, as ex officio clerk of the county court, in the collection and payment of solicitor's fees therein, were not "similar" to the services performed by him as clerk of the circuit court in the collection and payment of solicitor's fees in the latter.

Said opinion of July 25, 1928, (Vol. 6, office edition, p. 327), is hereby overruled and withdrawn.

Section 3734, Code of Alabama, 1923, in Chapter 110 dealing with "Court Costs and Fees" states:

"The law of costs must be deemed and held a penal law and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

Section 3738 prescribes solicitor's fees, to be taxed against the **defendant on conviction** to be collected as other costs and paid into the **county** or state **treasury**, as may be authorized or required by law. You will notice here that it is contemplated that certain of such fees shall be paid into the **county treasury**.

Section 3739 prescribes the fees of clerk of circuit court in **criminal cases**.

Section 3800 reestablishes county courts in certain counties.

Section 3801 provides that the probate judge shall be ex officio judge of the county court.

Section 3803 provides that the clerk of the circuit court shall be ex officio clerk of the county court.

Section 3804, with regard to fees of clerks of county courts, reads as follows:

"The fees and compensation of said clerks for their duties as clerks of the county courts shall be the same as now allowed by law to the clerks of the circuit court in criminal cases, and shall be paid in like manner."

It is the duty of the clerk of the circuit court to collect the solicitor's fees earned in the circuit court, and, under Section 5518, the clerk must report quarterly to the state auditor and pay over to the state treasurer all solicitors' fees by him collected therein, and for the collection and payment of such fees said clerks may retain five per cent commission on the amount so collected and paid over, and the necessary expense of remitting such amount to the state treasurer.

By Section 3759, it is provided that, for every **conviction for a misdemeanor** in the county courts or inferior courts there shall be taxed and collected as a part of the costs and **paid into the county treasury** the same solicitor's fees provided for convictions in such cases in the circuit court whether such judgment be paid in the county court, or on appeal to the circuit court.

Section 3758 prescribes the fees allowable to the officers specified for the services specified in the county court. The pertinent part of said section reads as follows:

"The clerks of the circuit court who by law shall be made ex officio clerks of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court. * * * Solicitor's fees shall be the same as for similar services rendered in the circuit court. * * * fees for services of solicitors belong to the county and shall be paid, when collected, into the county treasury; * * *"

In referring to Section 3759, supra, I invite your attention also to Section 5512, the pertinent part of which, reads as follows:

"For every conviction of a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for convictions in such cases in the circuit court, and said fees shall be placed in the solicitor's fund of such county by the treasurer of such county;

and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the solicitor's fee taxed for such conviction in the circuit court, and this solicitors' fee previously taxed in the county court or inferior court, shall be paid, when collected, into the county treasury, and placed in the solicitors' fund of such county by the treasurer of said county."

In the Code of Alabama, 1923, Section 3759 **appears** to be Section 7 of an Act approved Sept. 25, 1915, (General Acts 1915, p. 817). But this is not so. (See General Acts, 1915, p. 822). Said Section 3759 is a part of Section 9 of Acts 1915. Section 5518, *supra*, purports to be an amendment to Section 7 of an Act approved Sept. 25, 1915, appearing on page 322, General Acts, 1915, but the language of the original section sought to be amended does not read as it is quoted in the Act approved August 22, 1923, when same was amended. (General Acts, 1923, p. 207). However, this appears to be immaterial in view of the adoption of the Code.

By subsection 16 of Section 6724, it is provided as a duty of the circuit clerk:

"To render to the county treasurer, court of county commissioners, or boards of revenue, within thirty days **after each term of the court**, a **statement in writing** and under oath, of the **finances** assessed and **forfeitures** obtained during such terms, the amount of each, and against whom each was assessed or obtained, and also what money they have **received for the county**, specifying from whom, on what account, and the amount in each case; and, after deducting from **such** amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds."

That provision of Section 5512, *supra*, requiring solicitors' fee to be placed by the treasurer "in the solicitor's fund of such county" is useless and meaningless in so far as it might be interpreted as applying to counties generally throughout the state, for the reason that it would be ridiculous to set up a fund, separate and apart from all other county funds, denominating it "a solicitor's fund" and not subjecting it to any obligations or to any use. The only county in the State which, under present law, has a separate solicitors' fund, subject to obligations and use, is Jefferson County. In the words of Section 3758, *supra*, the fees for services of solicitors in the county court "belong" to the county." When received by the clerk, as ex officio clerk of the county court, they are received for the county.

The position heretofore taken that the services of the circuit clerk, as ex officio clerk of the county court, in collecting and paying over solicitors' fees earned in the county court, are not "similar" to the services he performs as circuit clerk with regard to fees earned in the circuit court, is not tenable, for the reasons that the services are similar. A comparison of subsection 16 of Section 6724 with Section 5518 clearly demonstrates this.

The word "similar" as used in the statutes speaking of "similar services" means, nearly corresponding; resembling in many respects; or having a general likeness to. It was never intended that the word should be interpreted to mean "precisely the same."

See Webster's International Dictionary.

All through the various sections of the Code hereinabove cited, wherein direction is given as to the place into which said fees are paid, we find the expression "county treasury," with the exception of that portion of Section 5512, heretofore referred to, which cannot, by any stretch of the imagination, be construed as meaning that such money is not received for the county. It is surely not received for the State.

On October 8, 1920, Assistant Attorney General Evans rendered an opinion to the Circuit Clerk of Baldwin County, in which he reached a contrary view, in answer to question one of the request presented on which the opinion was based. Said opinion (Vol. 8, office edition, p. 94), is hereby overruled in so far as it conflicts with this opinion and the reasoning contained herein.

On March 15, 1928, Assistant Attorney General Koonce rendered an opinion to the Circuit Clerk of Autauga County, in which he held that the clerk of that court, as ex officio clerk of the inferior court of Autauga County, created by a Local Act (Local Acts, 1927, p. 137) was entitled to five per cent commission on solicitor's fees in said court. This opinion is correct.

The opinions dated May 30, 1927, and April 7, 1927, to the Circuit Clerk of Mobile County, by Assistant Attorney General Rayburn, in so far as they may conflict with this opinion, are hereby overruled.

The opinion dated February 10, 1926, to the Circuit Clerk of Franklin County by Assistant Attorney General Brown, in the administration of my predecessor, in so far as it touched upon the subject here under consideration is hereby overruled. (Opinions Attorney General, 1926 office edition, Vol. 1, p. 74).

The opinion dated April 9, 1925, to the Circuit Clerk of Monroe County, written by then Attorney General Davis, in so far as it corresponds with the reasoning herein given and the conclusions herein reached, is hereby approved. (Opinions Attorney General, 1925, office edition, Vol. 1, p. 193). (Biennial Report, 1924-26, p. 120.)

The opinion dated July 10, 1925, to the Circuit Clerk, Wilcox County, written by Assistant Attorney General Field, in the administration of my predecessor, in so far as it deals with the subject here under consideration, and in so far as it concludes the clerk is entitled to said commission is hereby approved. (Opinions Attorney General, 1925, office edition Vol. 2, p. 27).

Opinion dated October 28, 1924, by former Assistant Attorney General Field, in the administration of my predecessor and addressed to the Chief Examiner, Department of Examiners of Accounts, in so far as it may conflict with this opinion is hereby overruled. (Office Edition, Opinions Attorney General, 1924, p. 921). (Biennial Report 1924-26, p. 33).

Opinion dated July 14, 1923, to the Circuit Clerk of Blount County by then Assistant Attorney General Cornelius, in the administration of my predecessor, in so far as it deals with the question here under consideration and in so far as it reaches the same conclusion in any respect is hereby approved. (Opinion Attorney General, 1923, office edition, Vol. 1, p. 363).

The opinion dated March 27, 1920, by former Attorney General Smith, to the County Solicitor of Shelby County (Opinions Attorney General 1918-

20, p. 499) in so far as it reaches the conclusions herein reached is hereby approved.

Any and all other opinions heretofore rendered in this or any previous administration, in conflict with this opinion, and dealing with the same subject and same laws, are hereby overruled and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

Hon. C. F. Jeter,
License Inspector,
Luverne, Crenshaw County, Alabama.

Taxation—License and ad valorem tax to be valid, must be paid in the county of residence of the owner.

Motor Vehicles—License for and tax on—what county paid in.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 1, 1929.

You request my opinion:

If a person is caught, who lives in another county, with a lost or stolen tag on his automobile, and is prosecuted for said offense, does such a person have to purchase a tag in the county in which he is prosecuted or must he go back to the county of his residence to purchase a tag?

In answer to your question, I am of the opinion that such a person is required to take out a license and pay the ad valorem tax in the county of his residence.

Opinion of Attorney General, Vol. 9, (office edition) p. 137.

Section 18 of Act No. 163, approved July 22, 1927, (Acts 1927, p. 158 et seq.) directs where such taxes are to be paid. This Section provides that "on and after the first day of October, 1923, every person, firm or corporation who desires to operate a motor vehicle on the public highways of Alabama shall first return such motor vehicle for ad valorem taxation to the tax assessor of the county in which he resides."

In an opinion addressed to Mr. W. L. Allen, License Inspector, on January 31, 1929, (Opinion Attorney General, Vol. 9, Office Edition, p. 137), I held that the ad valorem taxes must be paid and the license taken out in the county where the owner resides.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

The State Tax Commission,
CAPITOL.

Attention: Mr. L. H. Brassell.

License Tax: Each member of firm is required to pay license under Schedule 57 of Revenue Act 1919.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of June 4, 1929.

You request my opinion:

Under Schedule 57, Section 361 of an Act approved September 15, 1919, is a personal license to be collected from each individual engaged in the business of horse or mule trading? For example, if a firm composed of three members is engaged in this business should three licenses be collected.

I am of the opinion that three licenses should be collected in this instance. Schedule 57 of Section 361 of this Act, which is found in Acts 1919, p. 412, reads as follows:

"Schedule 57. Horse Dealers.—For each person engaged in the business of buying, selling or exchanging horses, mules, jacks, jennets, twenty dollars for each county."

This Section expressly provides that each person shall pay the license required. It does not provide that each person, firm or corporation shall pay the license. Therefore, there is no provision or authority of law for the issuance of one license of this character to a firm composed of three members. Each member composing this firm is required to pay a license of twenty dollars for each county in which he does business.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

Tax Assessor,
Tuskegee, Macon County, Alabama.

Exemptions—farm lands owned by State Baptist Orphanage, Macon County, not exempt from taxation.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of February 20, 1929, in which you state that the State Baptist Orphanage owns seven hundred and fifty-three (753) acres of lands

in Macon County. You further state that the Orphanage enjoys an income as rentals from said lands.

You request my opinion:

Where lands are owned by the State Baptist Orphanage and an income is enjoyed from the rentals thereof by said Orphanage are such lands taxable?

In answer to your question I am of the opinion that if the State Baptist Orphanage enjoys an income from said lands as rentals then that would defeat the exemption.

State et al vs. Church of the Advent, 208 Ala., 632,
Constitution 1901, Section 91,
Biennial Report of Attorney General, 1918-20, p. 393.

It will be observed that there is a material difference between the use of land exclusively for purely charitable purposes and renting it out and then applying the proceeds therefrom for such purposes. To rent out lands is not to use them within the meaning of the statute but in order to use it it must be occupied or made use of.

"To hold that property rented for business purposes is exempt when the rentals or income therefrom are used exclusively for religious, charitable, or educational purposes is extending the operation of the law further than is warranted by the language used. There is a clear and well-defined distinction between the use of property and the use of the income derived therefrom. * * * Government cannot discriminate between the uses which different societies or individuals will make of the proceeds of their business, and determine that this society or individual will make a more worthy disposition of the proceeds of his business than that, and therefore the one shall be taxed and the other not. * * * The fact that the income derived from rents or parts of the building not used is devoted exclusively to the objects and purposes of the association, and not used for the benefit or profit of its members, can make no difference. The law looks to the property as it finds it in use, and not to what is done with its accumulations."

State et al vs. Church of the Advent, supra.
State et al vs. First Presbyterian Church, 208 Ala. 635.

The Constitution of the State of Kansas contains a similar provision to Section 91 of our Constitution and in the case of Washburn College vs. Shawnee, 8 Kan. 344, it was said:

"To bring this property within the terms of the section quoted it must be 'used exclusively for literary and educational purposes'. This involves three things: First, that the property is used; second that it is used for educational purposes; and, third, that it is used for no other purpose. * * * Nor is ownership evidence of use. * * * This is too plain to need either argument or illustration. If the framers of the Constitution had intended to exempt all property belonging to literary and

charitable institutions from taxation, the language employed would have been very different."

Since said Orphanage enjoys an income from rentals it will be your duty as Tax Assessor to assess said lands for taxation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

The Clerk of the Circuit Court,
Scottsboro, Jackson County, Alabama.

Circuit Clerks—Commission can be collected by the clerk on solicitors fees in county court.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 21, 1929, in which you request the opinion of the Attorney General on the following question of law:

Is the circuit clerk and acting as ex officio clerk of the county court entitled to collect a commission of five per cent on all fines and solicitors fees collected by him?

I am of the opinion that you, as such clerk, are entitled to collect a commission of five per cent on fines and forfeitures collected by you, under subdivision 16 of Section 6724, Code of Alabama, 1923.

You are also entitled to collect five per cent commission on solicitor's fees earned in County Court of which you are ex officio clerk. See copy of opinion hereto attached.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

encl.

June 12, 1929.

The Judge of Probate,
Opelika, Lee County, Alabama.

Deeds—no tax on deed conveying right-of-way to city.
Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 15, 1929. You state that the City of Opelika has filed deeds for record which deeds convey rights-of-way. You also state

that some of the deeds recite a consideration of \$1.00 while others recite considerations of \$600.00 and \$2,500.00.

You request my opinion.

Will the city be required to pay a deed tax on deeds which convey rights-of-way?

In my opinion the city will not be required to pay a deed tax on such deeds.

I rendered an opinion on October 18, 1927, to the Judge of Probate of Autauga County, (Biennial Report of Attorney General, 1926-28, p. 326) in which I held that deeds to the State, County or City conveying rights-of-way for roads do not require a filing tax.

A city is a governmental instrumentality. It is never presumed that the government intends to tax itself or any of its instrumentalities. Deeds to cities, conveying rights-of-way, are, therefore, exempt from taxation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

Judge of Probate,
Eutaw, Green County, Alabama.

Counties—Note signed by Governor, Superintendent of Education and President of Normal School not legal investment for sinking fund.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 23, 1929.

You request my opinion:

Is a note signed by the Governor, the Superintendent of Education, and the President of a Normal School a legal investment for the sinking fund of a county?

In my opinion the note referred to above is not a legal investment for the sinking fund of a county.

The Attorney General rendered an opinion on March 30, 1920, to Mr. Silas W. Davis, Government Director, (Biennial Report Attorney General 1918-20, p. 500) in which he held that the policy long adopted in this State is that a county or other municipal corporation can incur no liability, make no contract, nor do any act, regardless of the benefits that might be derived thereby, unless the power to do so is derived either from an express authorization of the law, or by necessary implication.

The investment which you mention in your letter is not expressly authorized by law, nor is it authorized by implication.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

The Clerk of the Circuit Court,
Bay Minette, Baldwin County, Alabama.

Fees—clerk of the circuit court as ex-officio clerk of the county court
—commissions allowed.

Fees—circuit clerk—commissions on stenographers' fees.

Acts—Local Acts 1898-1899, p. 334. Baldwin County, construed.

Opinion by the Attorney General.

Dear Sir:

With further reference to your letter of August 4, 1928, and the opinion rendered in answer thereto by Assistant Attorney General Evans, said opinion is hereby overruled and withdrawn and this opinion is substituted in lieu thereof. You request my opinion:

1. As ex-officio clerk of the county court am I entitled to deduct five per cent from county court solicitors' fees when paying same into the county treasury?
2. Am I entitled to deduct five per cent from stenographers' fees collected by me in the circuit court and paid into the county treasury?
3. Am I entitled to deduct five per cent from money collected and paid into the County Treasury for State witnesses under a Local Act for Baldwin County, Acts 1898-1899, p. 334?

In answer to your first question will state that you are. The duties are similar to your duties in regard to such fees in the Circuit Court and the money is money received for the county because it must be deposited in the County Treasury.

Section 5512, in so far as it speaks of a solicitor's fund for counties is meaningless, because there is no such thing except in Jefferson County.

In answer to your second question will state that you are entitled to deduct five per cent from stenographers' fees. See Section 6738, Code of Alabama, 1923.

In answer to your third question, the Act *supra*, is complete within itself and the witness fees there spoken of must be handled as there directed. No deduction is allowed in said Act for services to be performed by the Cir-

cuit Clerk. Attached hereto I hand you copy of opinion rendered by me to the Chief Examiner of Accounts, which covers fully your first question.

Please return the opinion which I have withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

License tax—when due become prior claim and lien when the stock of one who owes the tax has been attached by other creditors.

Opinion by Assistant Attorney General Knight.

Dear Sir:

I have your letter of recent date. You enclose a letter from one of your agents in which he states that a certain merchant owes a license or privilege tax for the sale of cigarettes, cigars, etc., and that the stock of goods of this merchant has been attached by other creditors.

You inquire whether or not the license tax due becomes a prior claim or lien upon such property of the one who owes the tax.

I am of the opinion that the license tax due becomes a prior lien when the property of a dealer is attached by other creditors.

It is provided that the State shall have a lien **superior** to **all other liens** upon **all the goods**, wares and merchandise or **any other** property owned by any person, firm or corporation **liable** for the payment of license taxes due the state * * * *.

Section 74 of Act approved July 22, 1927, (General Acts, 1927, p. 186).

A careful reading of the Act imposing the license tax upon dealers in tobacco clearly demonstrates the intention of the Legislature that the retailer should pay the tax. While it is provided that the wholesaler may pay the same, the Act when considered as a whole, shows that this provision was inserted for convenience of dealers and not to bind the wholesale dealer to the payment of the tax.

(General Acts 1927, p. 142, 147).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 13, 1929.

Mr. Raymond E. Thomason,
Member of City Council,
Tarrant City, Alabama.

Municipalities—have not the authority to donate to each church in the city the cost of its street improvement.

Opinion by Assistant Attorney General Knight.

Dear Sir:

I have your letter of May 15th. You inquire whether or not it is legal for the City of Tarrant City to donate to each church the cost of the street improvements, which cost would be assessed against the church.

I am of the opinion that you are without authority to make such donation.

Section 94 of the Constitution provides, inter alia, that the Legislature shall not have the power to authorize any city to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.

Report Attorney General 1920-1922, p. 60,

Garland v. Board of Revenue, 87 Ala. 223.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

June 15, 1929.

The County Treasurer,
Birmingham, Jefferson County, Alabama.

Counties—Taxations. Can levy a special tax for payment of debts created for erection, construction and maintenance of public buildings and bridges. Interest on said debt is payable out of said funds.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of May 29, 1929, in which you state as follows:

"Jefferson County has outstanding bonds as follows:

Hillman Hospital, construction.....	\$ 500 000.00
Public School Construction.....	1,100,000.00
Court House Construction.....	500,000.00

The semi-annual interest on these bonds is payable June 30, 1929.
Each of these issues are general obligation bonds of the county."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

"Whether or not the interest on these bonds can be paid out of money collected under a special levy by the county for "Bridges and Public Building Funds?"

In reply will say that Section 215 of the Constitution of Alabama gives the County authority to levy a tax of twenty-five cents upon the one hundred dollars of taxable values of the county, for the payment of debts created in the erection, construction and maintenance of necessary public buildings and bridges.

The tax above authorized has been levied and collected, as authorized by law, and is available for the purposes of the payment of debts created in the erection, construction and maintenance of necessary public buildings and bridges.

I am of the opinion that the bonds so issued for the construction of the Hillman Hospital, Public School Buildings and construction of a Court House, are debts created for the erection, construction and maintenance of necessary public buildings, and that the interest on these debts are a part of the debt and can be paid from the funds to the credit of the "Public Building and Bridge Funds" in the hands of the Treasurer of Jefferson County.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 17, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Capital stock of domestic corporation authorized for a purpose, but subsequently found to be unnecessary and, consequently, not issued, forms no part of the capital stock for measuring the amount of franchise tax required by Section 53 of Act No. 163, approved July 22, 1927, (Acts 1927, p. 176).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of March 21, 1929, is acknowledged. You make the following statement of facts:

The Alabama, Tennessee and Northern Railroad, a domestic corporation, at the time of its reorganization was authorized to issue one million, seven hundred thousand dollars of preferred stock and two million, five hundred thousand dollars of common stock to its stockholders. This stock, under the reorganization plan, was to be distributed among

old bond holders of the original corporation in payment of said bonds. Before all of this stock was delivered and before the receivership of said original corporation was completed the receivers bought in, with funds of the original corporation, certain of said bonds and cancelled them. The stock authorized to be issued in payment of the bonds so bought in has never been issued and cannot now be issued, since the bonded debt for the payment of which such stock was authorized has been otherwise paid.

You request my opinion:

Whether or not, under the facts stated, the amount of capital stock authorized, but not issued or issuable, is to be considered in estimating the amount of the annual franchise tax of said corporation.

In reply will say that, in my opinion, under the facts as stated above, such stock is not to be considered in estimating the annual franchise tax of said corporation. The shares of stock so authorized have never been issued and the purpose for which the issuance of such shares of stock was authorized no longer exists.

Section 53 of Act No. 163, approved July 22, 1927, (General Acts 1927, p. 176) provides as follows:

"Every corporation organized under the laws of this state, except strictly benevolent, education or religious corporations, shall pay annually to the state an annual franchise tax of two dollars on each one thousand dollars of capital stock."

The definition of capital stock of a corporation is given, in *re Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 99 Ala. 1, as follows:

"The capital stock of the corporation is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and is a trust fund for the benefit and security of the creditors of the corporation."

It is my opinion that the capital stock in question, as authorized, is neither paid, nor to be paid in. It is, in fact, no part of the capital stock of said corporation.

Being no part of the capital stock of said corporation, it should not be considered in estimating the annual franchise tax due by said corporation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 18, 1929.

Judge of Probate,

Tuscaloosa, Tuscaloosa County, Alabama.

Fees for filing and recording certificate of incorporation of West Alabama Burial Society. Probate Judge must charge fifteen cents for each one hundred words of the certificate of incorporation and two dollars and fifty cents for examining the certificate and fifty cents for certifying to a copy of such certificate.

Opinion by Assistant Attorney General Knight.

Dear Sir:

I have your letter of recent date. In it you state that you are enclosing copy of a certificate of incorporation of West Alabama Burial Society. I do not find this enclosure. You state that perhaps no charter fees are required in the matter. You also state that Section 7059 seems to indicate that some kind of fee should be charged. I take it that the services you are performing are under Section 7059, Code of Alabama, 1923.

You inquire what fees you should charge under the above mentioned Section of the Code.

I am of the opinion that you should charge fifteen cents for each one hundred words of the certificate of incorporation and also for examining the certificate you should charge two dollars and fifty cents.

Section 7059, Code of Alabama, 1923.

In the event you are required to certify to a copy of such certificate you should charge fifty cents where you use your seal of office and twenty-five cents where you do not.

Section 7059, Code of Alabama, 1923, provides that where persons incorporate without capital stock for the purpose of doing the business of a mutual aid, benefit, or industrial company or association that a certificate must be filed with the judge of probate verified by oath of two incorporators and recorded in the same manner as the certificate of incorporation of companies with a capital stock, and that a certified copy of the certificate must likewise be filed with the insurance commission, for which the same fees shall be charged as are provided for the incorporation of stock companies. Said Section 7059, Code of Alabama, 1923, above referred to provides what fees shall be charged in receiving and filing for record the certificate of incorporation of stock companies.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

June 18, 1929.

The Judge of Probate,
Bay Minette, Baldwin County, Ala.

Boards of Revenue—Members of Boards of Revenue on salary not entitled to additional compensation provided for in Revenue Act, 1923, for serving as member of Board of Review.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 9, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not members of the Board of Revenue of Baldwin County as created and constituted by Local Act of the Legislature of Alabama, 1927, p. 82, are entitled to the compensation provided for in Section 52 of the Revenue Act, 1923, p. 180, for their services while sitting as members of the Board of Review in addition to their salaries provided for in the Local Act of 1927, for members of the Board of Revenue of Baldwin County?

I am of the opinion that the above referred to Local Act fixed a definite salary of \$1,200 per annum as compensation for the members of the Board of Revenue, and considering this provision of the Act in connection with Section 52 of the Revenue Act of 1923, p. 180, which provides extra compensation for members of Boards of Revenue while sitting as Boards of Review, only provides additional per diem where the members of the Board of Revenue are not paid a salary. Section 52 of Revenue Act, 1923, p. 180, is as follows:

"Section 52. The members of the courts of county commissioners or boards of revenue, or courts of like jurisdiction of the several counties of the State shall receive, as members of the Board of Review, the same per diem and paid in the same manner as when sitting at a regular term of such Court of County Commissioners or Board of Revenue, when such compensation is fixed on a per diem basis, which compensation shall be in addition to that as now fixed by law, except in counties where such officials are paid a salary."

Construing the Local Act which fixes the compensation on a salary basis, and the proviso in the general Revenue Act of 1923, excepting counties where such officials are paid a salary, in my opinion the members of the Board of Revenue of Baldwin County who are paid a salary, are precluded from collecting the compensation provided for in Section 52 of the Revenue Act of 1927.

Attorney General's Report, 1926-28, p. 451.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 18, 1929.

Superintendent of Education,
Tuscaloosa, Tuscaloosa County, Ala.

Teachers—contracts of employment must be in writing.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of June 5, 1929.

You request my opinion:

Is it legal to employ teachers without a written contract?

In my opinion, it is not legal to employ teachers without a written contract.

Section 72, School Code, 1927, provides that the State Superintendent of Education shall prepare forms of contract that shall be executed between the Boards of Education and all regular employees. Teachers are employees of the County Board of Education. Section 161, School Code, 1927, provides that the County Superintendent of Education shall nominate in writing for appointment by the County Board of Education, all principals, teachers and all other regular employees of the Board.

The two sections, *supra*, provide for the nomination of teachers and for the form of contract to be executed by them.

They must, therefore, be employed by the form of contract prescribed by the State Superintendent of Education.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 21, 1929.

The Judge of Probate,
LaFayette, Chambers County, Ala.

Chauffeur's license—one who drives truck which he owns, for the purpose of transporting school children liable for a chauffeur's license.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of May 29th. You state that certain persons operate trucks exclusively for the purpose of transporting children to and from school. You submit a brief from the Hon. Chas. E. Fuller, and Chas. S. Moon, taking the position that the Act of 1923, p. 285, Section 9, which defines a chauffeur does not contemplate one who owns a truck and drives the same in transporting to and from school, children.

You request my opinion:

Should such person procure a chauffeur's license?

I am of the opinion that such person should procure a chauffeur's license.

Opinions of the Attorney General, 1926-28, p. 155.

Opinions of the Attorney General, Vol. II, p. 92, Office Edition.

In amplifying the opinion above referred to, it suffices to say that a chauffeur within the meaning of the Acts of 1923, p. 285, is an operator, who directly or indirectly receives compensation for operating a motor vehicle on the public highways.

It was not the intention of the Legislature in imposing this tax, to levy the same against a person driving a car for his individual or private purpose. However, anyone driving the same for hire and receiving compensation for the use thereof becomes liable for the tax. It matters not that the truck is not driven for the purpose of transporting the **general public**. It is unquestionably put to a public use within the meaning of the Act above referred to, when it is used in transporting school children.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 21, 1929.

The Clerk of the Circuit Court,
Clanton, Chilton County, Alabama.

Hard Labor Agent—clerk of the circuit court as hard labor agent without authority to employ counsel to represent him in a case which he conceives protects the fine and forfeiture fund of the county.

Opinion of Assistant Attorney General Knight.

Dear Sir:

I am in receipt of your letter of recent date. You state that as hard labor agent of Chilton County; you felt that in protecting the fine and forfeiture fund of your county from a possible loss occasioned by the Acts of 1927, (General Acts 1927, p. 52) which changed the method of handling county convicts, you employed counsel to represent you in the position that you took; that their employment was to represent Dolby Robinson in a habeas corpus proceeding, which proceeding you understood, would determine the question as to whether or not the officers of the county were entitled to the usual fees in cases of county convicts, or whether or not the county and the officers only received the fees to be paid under Section 3667 of the Code of 1923; if the officers receive only the fees payable under Section 3667, supra, there will arise a deficiency in the officers fees which will eventually exhaust the fine and forfeiture fund of your county.

I am of the opinion that you are without authority to employ counsel to represent you in such a matter, or to represent the officers of Chilton County in such a matter, or to represent Chilton County in such a matter, or to represent Dolby Robinson in a habeas corpus proceeding.

I have searched diligently for some authority by which you might be allowed, as hard labor agent of the county, on the approval of the Court of County Commissioners, to pay an attorney's fee under such circumstances as you have mentioned.

There is no authority for such payment out of the fine and forfeiture fund of your county. If the funds of your county are endangered by this controversy, it would have been the duty of your county solicitor or circuit solicitor to have represented the county's interest in this matter, hence, no provision is made by statute authorizing you to employ a private attorney.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 21, 1929.

The Register in Chancery,
Florence, Lauderdale County, Alabama.

Feeding of prisoners—where a writ of ne exeat republica has been issued out of the Circuit Court under authority of Section 6609 to Section 6618 of the Code of 1923, and the writ had to be executed and enforced by placing the defendant in jail, the cost of feeding this prisoner is chargeable against the State.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of recent date. You state that under authority of Sections 6609 to 6618 of the Code of Alabama 1923, a writ of ne exeat has been issued out of the Circuit Court and the defendant placed in jail for his failure to make bond and has remained for a great length of time. You inquire whether or not the expense of feeding and caring for this defendant is chargeable to the State or to the County. If not, where and how should same be charged?

In my opinion, the expense of feeding this prisoner is not a charge against the County, but against the State.

Where a prisoner, under Section 6609 of the Code is placed in jail for the purpose of enforcing a writ of ne exeat, he becomes a prisoner lawfully confined to jail. Under the General Acts of 1927, p. 694, it is provided that the State shall pay the cost of feeding prisoners in jail and that such amount as is actually necessary shall be allowed the sheriff for feeding such prisoners.

However, I am of the opinion that the amount that the State is forced to pay the sheriff for the upkeep of this prisoner while in jail becomes an

item of cost which should be borne by the unsuccessful party in the litigation, and in the event the costs cannot be made out of the defendant, the same should be taxed against the plaintiff, where the costs in the case might be apportioned against him, and this item of cost should be paid into the State Treasury when collected.

It is well to bear in mind that a writ of ne exeat is in aid of a civil litigation and the costs accruing thereunder are incident to the main litigation which is to be borne as the court may, in its discretion, adjudicate.

Section 7221 of the Code, 1923.

However, where the costs are not taxed against the plaintiff not paid by the defendant, under no circumstances should the county bear the expenses of feeding such a prisoner while in jail.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 21, 1929.

The Director,
State Highway Department,
CAPITOL.

Final settlement by Highway Department for constructing roads and bridges must be made in the manner provided in Section 23 of the Highway Code of Alabama.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of June 7th is acknowledged. You state, as facts, the following:

The Highway Department of Alabama entered into contract with the Granson Construction Company for construction of State Project S-284; Russell County. Bond was given for the due and proper construction of said project by the Granson Construction Company. The Granson Construction Company sub-let the construction of said project. The project has been completed and taken over by the Highway Department, but the Granson Construction Company, after having ample time to do so, has not advertised as provided by subdivision of Section 28 of the Highway Code of Alabama. The contractors, Granson Construction Company, owe considerable money on the work and material for completion of this project; in fact, they owe for the entire cost of the bridges and various other items in connection with same, amounting to more than the balance due them by the State. For this reason the Granson Construction Company is not interested in the final settlement by the State, as probably nothing can be collected from it.

Under the facts above stated, you wish my opinion as to whether or not, some one other than the contractor could make the advertisement required, or if settlement could be had without advertisement.

In reply will say that final settlement for the completion of the said project, under the contract, and the law applicable thereto, can be made, voluntarily, by the State Highway Commission with no one except the contractor, Granson Construction Company.

Under subdivision (c) of Section 28 of the Highway Code it is provided:

"The contractor shall immediately after the completion of the contract give notice of said completion by an advertisement in some newspaper of general circulation published within the city or county wherein the work has been done for a period of four successive weeks. In no instance shall final settlement be made upon the contract until the expiration of thirty days after the completion of same."

Under subdivision (d) of said Section 28, it is provided:

"Upon demand of the contractor for final settlement he shall file with the proper officials or authority by and with whom said contract was made, a sworn statement by the publisher of the newspaper as prescribed in provision (c) of this section, attaching thereto a copy of said publication of notice."

I am, therefore, of opinion that no one but the Granson Construction Company can make the advertisement provided for and that the Highway Commission is without authority to voluntarily make final settlement by paying over the balance due to anyone, without having in hand a sworn statement by the publisher of the newspaper as provided in said subsection (d).

The advertisement was evidently required in order that all persons, firms or corporations, who shall have supplied the contractor with labor, materials, feed-stuffs or supplies may have notice of the completion of the contract so that they may take proper steps to collect the amount due them by suit on the bond, if necessary, and so that all claimants may join in one suit against the bonding company, thus protecting the bonding company against a multitude of suits.

I am of the opinion that any collusion between the contractor and the bonding company to defraud such persons, firms or corporations by failure of the contractor to advertise and obtain final settlement, would not prevent such persons, firms or corporations from bringing suit on the bond. Under the facts stated by you, you should furnish any such person, firm or corporation, who desires it, with copy of the bond, so that such person, firm or corporation may take such steps for collection of claim as is desired. What steps shall be taken is not for you or me to decide.

If final settlement is not asked for by the contractor, you should hold the balance due to be paid out on order of court. In my opinion, you are not in position to initiate or force a settlement. For you to undertake it, would be unsafe for the State.

So far as I can judge, from the facts stated by you, an attempt is being made to thwart the person, firm or corporation who has supplied labor, materials, feed-stuffs or supplies in the bringing of suit against the bond, on account of the following provision in subsection (e):

"That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof," etc.

By subdivisions (c) and (d) final settlement cannot be made by the Highway Department until the advertisement required has been made by the contractor and the contractor has filed with the Highway Department a sworn statement by the publisher of the newspaper, as prescribed, attaching to the demand for settlement a copy of said publication of notice.

It would seem that, for some reason, the contractor is trying to hide the bonding company behind this provision. If so, in my opinion, the courts can prevent a fraud being practiced.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 21, 1928.

The Tax Assessor,
Geneva, Geneva County, Ala.

Taxation—Boards of Review—in fixing assessments for Tax Year 1929, cannot consider evidence tending to increase or decrease valuation by matters that happen after October 1, 1928.

Opinion by Special Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 11, 1929, in which you state as follows:

"The Board of Review is in session and ask that I write you for information relative to the districts in this county which suffered losses on account of the recent flood. In view of the fact that tax values were made as of October 1, 1928, and the losses came later, the Board wants to know if they will be authorized to make reductions in accordance with the losses sustained by the taxpayer."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Whether or not the Board of Review can make reductions in assessments on real estate assessed for the Tax Year 1929, on account of damages sustained in the flood in the Spring of this year?

I am of the opinion that property assessed October 1, 1928, is based on the value of the property as of date October 1, 1928, and the Board of Re-

view in hearing these cases with reference to fixing a valuation for taxation for the year 1929, could not take into consideration any facts in connection with the value of said property after October 1, 1928. In other words, nothing that happened tending to increase or decrease the value of the property after October 1, 1928, can be considered by the Board of Review in ascertaining the taxable value of October 1, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 22, 1929.

The Judge of Probate,
Ashland, Clay County, Alabama.

Section 3095, Code of Alabama, 1923, being the same as Section 239 of Revenue Act, 1919, is valid and binding as to Tax Assessors and Tax Collectors.

Real property sold for state and county taxes cannot be resold for municipal taxes assessed on such property, for same year, against same taxpayer.

Where real property has been sold, for state and county taxes, municipality having assessment against such taxpayer on such property may redeem under Section 2145, Code of Alabama, 1923.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of June 11, 1929. You wish my opinion upon the following:

1. Can a city by ordinance have the county tax assessor assess and the county tax collector collect the city taxes, when such officers do not desire to do the work?
2. If a piece of real estate has been sold for state and county taxes during the present tax collecting year, can it be resold for city taxes assessed on such property against such delinquent?

In reply will say that there can be no doubt, in my opinion, that Section 3095 of Code, 1923, which is the same as Section 239 of Revenue Act, 1919, (Acts 1919, p. 352), is valid and binding as to tax assessors and tax collectors. When the proper municipal authorities have duly adopted ordinances as provided by said section, the duty upon the assessor to assess and upon the collector to collect the municipal taxes is as binding as is the duty to assess and collect state and county taxes. The offices of tax collector and tax assessor are entirely statutory and the duties of such officers are such as are provided by statute.

Those who accept public office which require them to render official services, must take the office **cum onere**. They must render services required by law even though no compensation is provided therefor.—The State ex rel C. T. Pollard, Jr., v. Willie Brewer, Auditor; Mobile County v. Williams, Judge. A municipality is a creature of the State Legislature and an instrumentality of the State government. The Legislature has full legislative power with regard thereto, except as restrained by the Constitutions, State and Federal.

By Section 74 of Act No. 163, approved July 22, 1927, (Acts 1927, p. 186) the State and counties have a lien superior to all other liens upon all the goods, wares and merchandise or any other property owned by any person, firm or corporation liable for the payment of license, franchise or other taxes due to the State or County, and all costs. By Section 2129, Code of Alabama, 1923, cities and towns have a lien for taxes upon all property assessed for taxation, which shall be superior to all other liens, except for taxes held by State or County.

It is my opinion that if real estate has been sold, as provided by law, this year, for State and County taxes, it cannot be sold for city taxes assessed to the taxpayer whose property was so sold. In other words, the purchaser having bought under the superior lien gets a title free of the inferior lien except as provided by Section 2145 of the Code, 1923. This Section provides what a municipality may do under the circumstances named by you. Under this section of the Code, the municipality may redeem the property, so sold, from the purchaser at the sale for State and County taxes. This section of the Code was evidently enacted to meet the very contingency named by you.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 24, 1929.

The Judge of Probate,
Ashville, St. Clair County, Alabama.

License tax: Deed tax should be paid on both real and personal property.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of June 3, 1929, enclosing copy of deed showing the transfer of both real and personal property.

You request my opinion:

Should the deed tax be charged on the value of the personal property as well as on the real estate conveyed?

The answer to your question is in the affirmative, and is especially covered by Section 21½ of an Act approved July 22, 1927 (Acts 1927, p. 163). The part of said Section which is pertinent to your inquiry reads as follows:

"Section 21½. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments of conveyance executed prior to October 1st, 1923, shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record, to-wit: Upon all such instruments which are executed to convey real or personal property situated in this State of the value of five hundred dollars or less there shall be paid the sum of fifty cents, and upon all such instruments executed to convey real or personal property situated in this State of more than five hundred dollars in value there shall be paid the sum of fifty cents for each five hundred dollars or fraction thereof in value of property conveyed by such instrument * * *."

It, therefore, clearly appears from the above quoted section that the deed tax should be charged on the value of both real and personal property.

Report Attorney General, 1926-28, p. 653.

Report Attorney General, 1924-26, p. 57.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 24, 1929.

State Tax Commission,
CAPITOL.

License Tax: Plumber not required to pay license under Schedule 87. Revenue Act 1919, unless he maintains regular place of business.

Opinion by Assistant Attorney General Cobb.

Gentlemen: Attention Mr. Jno. S. Mooring.

I have your letter of March 4, 1929, in which you give the following statement of facts:

"A wholesale or large retail firm carries a stock of material suitable for plumbing work. A practical plumber locates in the town and does the actual labor of plumbing, though he does not work for the house carrying the stock of material.

Mr. A., who is building a house, calls in this plumber who makes practically two estimates, one for the amount of material required, and

the other for the approximate cost of the plumbing labor. He carries this estimate of the material required to the house that carries the stock of material and this house agrees with Mr. A to furnish the material for a definite fixed amount. The plumber then arranges with Mr. A that he will do the work by the day or by the hour. The net result of this method is that Mr. A buys the material for the plumbing from the merchants and employs the plumber to do the actual plumbing work."

Under the above statement of facts you request my opinion whether the plumber's license as provided by Schedule 87, Section 361 of the Revenue Act, 1919, should be paid by anyone, and, if so, should it be paid by the plumber or the merchant who furnished the material.

Answering your question I am of the opinion that a plumber or gas fitters license is not due by either the wholesale or retail firm, or by the plumber doing the work, unless the plumber doing the work has a regular place of business in the town. If he maintains a regular place of business of his own, under the above statement of facts he would be liable for plumber's license.

Schedule 87, *supra*, reads as follows:

"Schedule 87, PLUMBERS OR GAS FITTERS:—For each person doing business as a master plumber, or steam fitter, or tin shops, in towns or cities of ten thousand or more inhabitants, twenty-five dollars, in all other places, ten dollars."

A master plumber is properly defined in the case *Com. v. McCarthy*, 225 Mass. 192, as follows:

A master plumber is a plumber having a regular place of business and who himself or by journeymen plumbers in his employ, performs plumbing work.

Therefore, I am of the opinion that the wholesale or retail firm would not be liable for a license under Schedule 87, *supra*, unless the plumber is in his employ, and that the plumber would not be liable unless he maintains a regular place of business.

Opinions of Attorney General, 1926-28, p. 436.

Yours truly,
CHARLIE C. McCALL,
Attorney General

June 24, 1929.

Hon. Seth P. Storrs,
Commissioner of Agriculture and Industries,
CAPITOL.

Construction of Sections 195, 196 and 218 as related to labeling or branding paints.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of June 12, 1929, is acknowledged.

You make the following statement of facts:

A large lot of paint is being offered for sale in Birmingham, Alabama, which is labeled as having been manufactured for an Atlanta paint concern. The president of the said Atlanta paint concern has advised you that the paint in question was not manufactured for it and that it had not authorized the use of its name on this paint. Said president requests you to take action against this particular lot of paint under the provisions of Section 218 of the Agricultural Code of Alabama, since it does not contain an accurate statement regarding the name and address of the one for whom it was manufactured.

You ask to be advised whether or not, in my opinion, you can take such action under the provisions of said Section 218.

In reply will say that, under the facts stated by you, it is my opinion that no action can be taken by you in the premises under said Section 218. So far as is pertinent to your inquiry Sections 195, 196 and 218 of the Agricultural Code of Alabama read as follows:

"195. Every person who shall sell, within this state, any white lead or paint, shall accurately label the same as hereinafter required."

"196. Labels required by this article shall clearly and distinctly state the name and address of the manufacturer of the article, or the dealer therein, or of the party for whom manufactured, and, for the purpose of this article, paint shall be deemed to be improperly labeled or misbranded: (1) If it be an imitation of, and offered for sale under the name of another article; or (2) if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package; or (3) if any label of the package containing it shall bear any statement, design or device regarding the ingredients or composition of the paint, which statement, design or device shall be false or misleading in any respect. The label shall also state, in case of liquid paints, and other compounds, on packages holding one quart or more, the net measure of contents of each can, package or container. In case of white lead and other paints and compounds, the label shall show on packages weighing four pounds or more the net weight of each can, package or container."

"218. Any * * paint * * which is adulterated or misbranded or under standard grade, weight or measure claimed within the meaning of any provision of this code and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this state, shall be liable to be proceeded against in the circuit court of the county," etc.

Under the facts stated by you the only inaccurate labeling stated by you is that paint in question was labeled as having been manufactured for an Atlanta paint concern, when, in fact, it was not. This was, in fact, an inaccurate labeling, but not improperly labeled or misbranded as defined in said Section 196, which constitutes such an offense as authorizes proceedings in the circuit court under said Section 218. You will see that the improper labeling or misbranding complained of does not fall within either of the three categories named in said Section 196, first, it is not imitation of and offered for sale under the name of another article; second, the contents of the package as originally put up has not been removed in whole or in part and other contents placed in such package; third, the label of the package does not bear any statement, design or device regarding the ingredients or composition of the paint.

In other words, under the statement as made by you, there has been no improper labeling or misbranding of the paint within the definition of such, as found in the Agricultural Code of Alabama. Under the facts, as stated, there is, literally, an inaccurate statement as for whom the paint was manufactured, but this statement is immaterial so far as any provision in said Agricultural Code is concerned, that I have been able to find or that has been called to my attention. Said Section 196 provides what shall be improper labeling or misbranding and the inaccuracy mentioned does not fall within either of the three categories there set out.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 24, 1929.

The Clerk of the Circuit Court,
Talladega, Talladega County, Alabama.

Fees: Circuit Clerk entitled to fee of thirty cents for each subpoena issued for a witness and to fee of fifteen cents per hundred words for each copy he is required to furnish.

Opinion of Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of March 20, 1929.

You state that you find several civil cases in which the Clerk has entered on the fee book a charge of thirty cents for issuing a subpoena and twenty cents for a copy thereof.

You inquire whether or not these are proper charges.

I am of the opinion that the Clerk is entitled to thirty cents for each subpoena issued and a fee of fifteen cents per hundred words for each copy he is required to make.

Section 7278 of the Code of 1923 provides that the Clerk is entitled to fifteen cents per hundred words of any paper he is required to copy, unless the fee for such service has been fixed upon a different basis.

I find no express provision as to a different amount to be allowed for copying a subpoena.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 24, 1929.

The Treasurer,
Heflin, Cleburne County, Alabama.

County gasoline tax fund: County Commissioners are without authority to create debts against an anticipated income from the gasoline excise tax which is distributed to the various counties by the State.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of March 12, 1929. You state that in the year 1926 the Commissioners Court bought certain road machinery to maintain the county roads and issued warrants payable semi-annually against the county road fund. You state that Cleburne County has no funds in the county road fund. You also state that Cleburne County bought some bridges to replace old bridges and that warrants were issued against the county road fund and county bridge fund to pay for the same. You state that both of these funds are about exhausted. You also state that on December 19, 1928, the Judge of Probate issued three deferred warrants in payment of metal pipings for roads which warrants were to be paid out of the special gasoline tax fund. You state that the warrants were registered with you as Treasurer. You state that the work which is now being done on your road will consume your anticipated or future revenue from your county's share of the gasoline tax.

You inquire, first, whether or not the gasoline tax fund may be used to discharge an indebtedness created prior to the receipt of such fund.

You inquire, second, whether or not, when the warrants for this indebtedness were to be paid out of a particular fund and when this fund is exhausted, the warrants may be paid out of the gasoline tax fund.

You inquire, third, whether or not you may incur an indebtedness in anticipation of your share of the gasoline tax.

In answer to your first question, I am of the opinion that you are without authority to use the gasoline tax fund for the payment of an indebtedness accrued prior to the receipt of your county's share of this tax.

In answer to your second question, I am of the opinion that the Court of County Commissioners are without authority to issue deferred warrants against the gasoline tax fund, where a sufficient amount has not already accrued in said fund to pay such warrants.

In answer to your third question, I am of the opinion that the Court of County Commissioners is without authority to issue deferred warrants against this fund where the fund has not accrued.

You will note that each of the answers is of identical import.

It is apparent from a reading of the Act approved August 27, 1927 (General Acts, 1927, pp. 328-329) that it was the intention of the Legislature to restrict the counties in the use of the gasoline tax to current maintenance and upkeep of roads and bridges. It appears that it was the legislative intent that this tax should not be anticipated and the debts should not be created against it. When the tax has accrued and been paid to the county and a fund accumulated the county may use the same in the maintenance and upkeep of roads and bridges.

This identical question has been previously answered by this office in an opinion of May 29, 1929, to the Judge of Probate of Pike County, Alabama, a copy of which I enclose herein.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 25, 1929.

The Judge of Probate,
Athens, Limestone County, Alabama.

Counties—Use of gasoline excise tax—maintenance—construction—defined.

Opinion of Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 30, 1929, in which you state that your Court of County Commissioners of Limestone County desire a construction of Section 9 of an Act approved August 27, 1927 (General Acts, 1927, p. 328) and you request my opinion construing said section in the light of the following inquiries:

"1st. Would it be construction or maintenance if an old wood bridge 4-6-10 or 16 feet wide, that has gone bad, be torn out on a main country road and be replaced with a new one having concrete abutment and steel floor joists?

2nd. Would it be classed as construction or maintenance to run a road grader pulled by a tractor and open up the side ditches and otherwise smooth up the surface of an existing county road?

"3rd. In the reshaping and smoothing up an existing county road it is desirable to make a change in the alignment, say for 150 yards to eliminate a sharp or blind curve. Will that be classed as construction or maintenance?

"4th. Will it be classed as construction or maintenance to surface with gravel an existing county road, where there is already some gravel surfacing?"

In my opinion the work referred to in your first inquiry would be classed as construction and the same could not be paid out of the excise gasoline tax apportioned to counties.

In my opinion the work referred to in your second inquiry should be classed as maintenance and it would be proper to pay for this work out of the proceeds of said excise tax.

The work referred to in your third inquiry, should be classed as construction and therefore, is not a proper charge against said fund. The fact that a portion of the road is built new for the purpose of straightening the same even though it would be for a short distance, could not change its character. Otherwise under maintenance you could construct a road for ten miles or more, and such work of construction could be done under the guise of maintenance from a fund not authorized to be used for such a purpose.

The answer to your fourth inquiry is the same as my answer to your second inquiry.

Opinions of Attorney General, 1922-24, p. 281,

Opinions of Attorney General, 1926-28, pp. 117, 329, 366,

Section 9, Act approved Aug. 27, 1927 (General Acts 1927, p. 328).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 25, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
Montgomery, Alabama.

Fees—Judge of Probate of Montgomery County not entitled to fee provided for in Section 9025 of the Code of Alabama, 1923. Said fees so collected under this Section should be paid into the treasury of Montgomery County.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of June 6, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not "the fee of twenty-five cents" referred to under Section 9023 of the Code of Alabama, 1923, should be paid by the Judge of Probate of Montgomery County into the county treasury of Montgomery County, under Acts of the Legislature, 1923, page 769, and particularly Section 3 thereof, and also Act of Legislature 1927, page 219, and particularly Section 3 of said Act?

The Act of the Legislature, 1923, Section 3, page 769, applies to Montgomery County, and provides as follows:

"That all of said officers shall pay into the county treasury of said counties, all costs, charges of courts, fees and commission authorized by law, **or which may hereafter** be authorized by law to be collected by said officers as other moneys belonging to said counties are paid. The court of county commissioners, boards of revenue and other courts of like jurisdiction shall have the power and authority to have audited the account of the said officers for the purpose of requiring a strict compliance with the provisions of this Act."

This Act was approved October 1, 1923.

At the time of the approval of this Act there was no provision of law in existence which required the judge of probate to attest the satisfaction of mortgages on the records, and no provision for the collection of a fee of twenty-five cents for making such attestation.

However, the Code of Alabama, 1923, which became effective August 16, 1924, contains the following provision (Section 9023) with reference to the duties of judges of probate in the matter of the attestation of the payment or satisfaction of mortgages and providing a fee of twenty-five cents therefor.

"9023. FULL PAYMENT OR SATISFACTION OF MORTGAGE DEBT ENTERED.—If a mortgage or deed of trust which is of record has been fully paid or satisfied, the mortgagee or transferee or assignee of the mortgage, or trustee or cestui que trust of the deed of trust, who has received payment or satisfaction, must on request in writing of the mortgagor, or of a judgment, or other creditor of the mortgagor, having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, or owner of the lands mortgaged, or a junior mortgagee, or of the debtor in a deed of trust, enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust, such entry must be witnessed by the judge of probate, or his clerk, who in his official capacity, must attest said satisfaction; or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances, and filed for record. For making such attestation the judge of probate is entitled to a fee of twenty-five cents. Such entry operates a release of the mortgage or deed of trust, and is a bar to all suits thereon at law or in equity."

The Legislature of Alabama, 1927, passed an Act to fix the salary of judges of probate, which applies to Montgomery County. Section 3 of said Act is as follows:

"That all of said judges of probate shall pay into the county treasury of said counties, all costs, charges of courts, **fees and commissions authorized by law, or which may hereafter be authorized by law** to be collected by said judges of probate as other money belonging to said counties are paid. The court of county commissioners, boards of revenue and other courts of like jurisdiction shall have power and authority, and it shall be their duty to audit the accounts of said judges of probate for the purpose of requiring a strict compliance with the provisions of this Act."

After carefully considering the two Acts of the Legislature above referred to, fixing the salary of the judge of probate of Montgomery County, and Code Section 9023, I am of the opinion that the Act of the Legislature approved October 1, 1923, clearly **provides that all costs charges of courts, fees and commissions authorized by law, or which may hereafter be authorized by law** shall be paid into the county treasury by the judge of probate. Section 9023 of the Code became effective nearly a year after the approval of the Act of 1923. This Section imposes a new duty on the judge of probate and allows a new fee. Thus, this fee is clearly a **fee hereafter authorized by law**, which the legislature has directed should go into the county treasury.

The Act of the Legislature, 1927, page 219, increasing the compensation of the judge of probate of Montgomery County carries a similar provision with reference to fees **now and hereafter** authorized by law to be paid into the county treasury.

The Legislature of Alabama in each Act dealing with the matter of salary of the probate judge of Montgomery County, has fixed a definite and certain sum for his compensation for his services in lieu of all costs, charges of court, fees and commissions, and has specifically directed in unmistakable language that all costs, charges of court, fees and commissions collected by him should be paid into the country treasury. The courts of county commissioners or boards of revenue in the same Sections are given authority and it is their duty to audit the accounts of the judge of probate for the purpose of requiring a strict compliance with the provision of the Act. This provision was put into the Act for the evident purpose of directing the courts of county commissioners or boards of revenue to see by an audit that the judge of probate pays all costs, charges and court fees and commission **now provided for or hereafter provided for by law** into the country treasury.

I am therefore, of the opinion that "the fee of twenty-five cents" provided for under Section 9023 of the Code, and collected by the judge of probate of Montgomery County, should be paid into the treasury of Montgomery County, and should in no event be retained by the judge of probate as his fee or personal property.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 25, 1929.

The Tax Assessor,
Anniston, Calhoun County, Alabama.

Exemptions: Hospitals from taxation.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 1, 1929.

You request my opinion:

1. Is a hospital entitled to any exemption from ad valorem tax where such hospital has only four wards with four beds each, and a total of only forty beds, and where the treatment of charity patients given in various parts of the hospital is more than fifteen per cent of the total business?

2. If such hospital is allowed exemption for charity work, would the shares of the corporation be affected by the exemption accorded to the corporation on its real and personal property?

In answer to your first question, I am of the opinion that all real and personal property used **exclusively for hospital purposes to the amount of \$20,000.00** where such hospital maintains wards for charity patients and gives treatment to such patients and the treatment of charity patients constitutes at least fifteen per cent of the business of such hospital, is exempt from taxation.

General Acts of Alabama, 1923, p. 153, Section 2.

In answer to your second question, I am of the opinion that where a hospital is allowed an exemption for charity work, the shares of capital stock of said hospital would not be affected by the exemption accorded the corporation on its real and personal property because the tax is levied against the shares of stock.

Ex parte State, in re The State v. Lovejoy, 188 Ala. 401.

You will understand that in order for a hospital to enjoy the exemption referred to in your first question, it must give treatment to charity patients, and such treatment must constitute fifteen per cent of the business of such hospital.

Under your second question, the tax is levied against the shares of capital stock, and is paid by the corporation, the corporation is given a lien on the shares of capital stock for the tax paid thereon, and, unless the value of the share exceeds the assessed value of the property returned by the corporation, there can be no assessment or collection against the shares. In other words a liability is fixed against the shareholder, and not against the corporation and the method of enforcing same is provided.

Ex parte State, in re The State v. Lovejoy, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 25, 1929.

The Tax Assessor,
Geneva, Geneva County, Alabama.

Taxation—Lumber kept on yard of lumber company for sale subject to ad valorem tax.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of April 10, 1920, in which you state as follows:

"The Thornton Lumber Company of Samson, Alabama, operates a planing mill and drying mill. They buy lumber from various little saw mills over the county, carrying a large stock of lumber on their yards at all times and I have been unable to secure from them an assessment on these lumber stocks."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Is this stock of lumber kept on the yard for sale by "The Thornton Lumber Company" of Samson, Alabama, in connection with the company's planing and drying mill subject to ad valorem tax?

I am of the opinion that the stock of lumber kept on the yard by The Thornton Lumber Company for sale in the course of the company's business, is subject to ad valorem tax, under Revenue Act passed by the Legislature of Alabama, 1919 (Acts Legislature, 1919, subdivision (d), p. 285). Subdivision (d) is as follows:

"(d) All stocks of goods, wares and merchandise, the assessments to be on the average amount on hand during the preceding year, but the amount so assessed shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies or manufacturing companies, or other associations, companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequently to the first day of October of a current year, but in such case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the first day of January, the tax shall be three-fourths of the tax for the whole year; if commenced after the first day of April the tax shall be one-half of the tax for the whole year; provided that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation carrying on such business shall fail to make return of the amount of stock as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the

last inventory made of such stock of goods, and may also by inquiry of persons believed to have knowledge of the subjects, obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 25, 1929.

The Highway Director,
State Capitol,
Montgomery, Alabama.

Arresting officer—making arrests for violation of Article II of Highway Act 1927, may approve appearance bonds as provided in Section 104 of said Act.

When appearance bond is not approved by arresting officer, he must forthwith take person arrested before nearest or most accessible magistrate, who shall fix and approve bond.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of February 13, 1929, in which you request the opinion of the Attorney General on the following question of law:

1. Whether or not officers making arrests for misdemeanors specified in the Highway Act of 1927, have the legal authority to approve appearance bonds?

2. Whether or not arresting officers have the legal authority to commit persons arrested by them to jail where no bond is made or approved, or must the arresting officer take said persons after being arrested before a judicial officer as provided in Section 104 of the Highway Act of 1927?

In answer to your first question, I am of the opinion that Section 104 (a) of the Highway Act of 1927 (General Acts 1927, p. 389), answers your question. Said Section 104 is as follows:

“(a) Whenever any person is arrested for a violation of any provisions of **this article** punishable as a **misdemeanor**, the arresting officer, shall as otherwise provided in this section, take the name and address of such person and the license number of his motor vehicle and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice, and such person shall, if he so desires, have a right to an immediate hearing or a hearing within twenty-four hours at a convenient hour and such hearing to be before a magistrate within the county or city wherein such offense was com-

mitted. Such officers shall thereupon and upon the giving by such persons of a sufficient written bond, approved by the arresting officer, to appear at such time and place, forthwith release him from custody.

Any person refusing to give such bond to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate.

Any person who wilfully violates his written bond to appear, given in accordance with this section, shall be guilty of a misdemeanor regardless of the disposition of the charges upon which he was originally arrested."

"(b) The provisions of subsection (a) of this section shall not apply to any person arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person or any person charged with reckless driving in excess of fifteen miles per hour within a business district or residence district, or in excess of forty-five miles per hour outside of a business or residence district nor to any person charged with driving while under the influence of intoxicating liquor or narcotic drugs nor to any person whom the arresting officer shall have good cause to believe has committed any felony, and the arresting officer shall take such person forthwith before the nearest or most accessible magistrate."

"(c) Any officer violating any of the provisions of this section shall be guilty of misconduct in office and shall be subject to removal from office."

This Section in my opinion, means that whenever any person is arrested for a violation of any provision of Article II of the Highway Act which is **punishable as a misdemeanor**, the arresting officer shall after making the arrest for the offenses described in said Act which is **punishable as a misdemeanor** do the following things:

1. Take the name and address of such person and the license number of his motor vehicle.
2. Issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice to appear at a convenient hour for a hearing before a magistrate within the county or city wherein such offense was committed.
3. The arresting officer thereupon when the person so arrested presents to him a sufficient written appearance bond to appear at such time and place described in the summons or notice, must approve same.
4. If the bond is a good and sufficient bond payable to the State of Alabama, it is the duty of the arresting officer to approve same, and **forthwith release the arrested person from custody.**

However, under sub-division (b) of Section 104, above set out, the arresting officer **has no such authority** to approve bonds in the following cases:

1. Persons arrested and charged with an offense causing or contributing to an accident resulting in injury or death to any person.

2. Any person charged with reckless driving in excess of fifteen miles per hour within a business district or residence district or in excess of forty-five miles per hour outside of a business or residence district.

3. Any person arrested and charged with driving car while under the influence of intoxicating liquors or narcotic drugs.

4. Any person whom the arresting officer shall have good cause to believe has committed any felony

When the arresting officer arrests a person charged with the offenses set out in the four preceding paragraphs, it is the duty of the arresting officer to take such person forthwith before the nearest or most accessible magistrate.

In answer to your second question, I am of the opinion that where persons are arrested for the violation of the laws contained in Article II of the Highway Act, the bond is not made and approved in accordance with Section 104, it is the duty of the arresting officer to take such person forthwith before the nearest or most accessible magistrate, swear out a warrant, charging the person so arrested with the particular violation of law of which he is guilty. In this event it then becomes the duty of said magistrate to set the amount and approve the bond, and do such things as are required by law in the further disposition of said case. When the officer carries the defendant before the magistrate and swears out a warrant, his duty ceases except to appear as a witness.

In connection with the enforcement of the Highway Act, I desire to call your attention to sub-division (c) of Section 104, set forth above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 26, 1929.

Mr. Ira Pegues,
7804 7th Ave., South,
Birmingham, Alabama.

Taxes: Act providing that county might levy excise tax on gasoline and prohibiting the levy of such tax by a municipality of such county and repealing any taxes levied by such municipality, is invalid.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of June 17, 1929.

You refer to a local Act of 1927 (Local Acts 1927, pp. 185-186), which provides that Jackson County may levy an excise tax on gasoline and the Act further attempts to repeal any such tax levied by municipalities in such county and to prohibit such a levy by such municipality.

You request my opinion as to the constitutionality of this Act.

I am of the opinion that the same is invalid in that more than one subject is contained in both the title and body of the Act. Therefore, the Act violates Section 45 of the Constitution of 1901.

To authorize the levy of the tax is one distinct purpose and to prohibit such levy by a municipality of the county is the second purpose. The duplicity of purpose pervades both the body and the title of the Act, rendering the same obnoxious to Section 45 of the Constitution.

Ballentine v. Wickersham, 75 Ala. 533.

Builders Co. v. Lucas, 119 Ala. 202.

Birmingham Mining Co. v. Tuscaloosa Co., 137 Ala. 260.

The constitutional inhibition is as emphatic, that a statute shall not embrace more than one subject, as is the mandate, that that subject shall be clearly expressed in the title.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 26, 1929.

The County Superintendent of Education,
Cullman, Cullman County, Alabama.

County Board of Education has no authority to appropriate funds to establish a two year course of junior college work.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of June 15, 1929. You state that it would be very desirable to establish a two year college course either in conjunction with the county high school or as a separate institution. This for the reason that numerous students of Cullman County are attending school elsewhere.

You inquire whether or not the County Board of Education has authority to expend public school funds of Cullman County to effectuate a plan by which a two year course of college, or junior college work, may be established in Cullman County.

I am of the opinion that you have no such authority.

The County Board of Education is charged with the maintenance of a uniform and effective system of public schools throughout the County.

The educational policy of the County shall be determined by the County Board of Education:

Section 96, Alabama School Code, 1927, p. 47.

Section 97, Alabama School Code, 1927, p. 47.

It appears on consideration of the law applicable to the duties of the County Board of Education that its duties are confined to the management and control of public schools in the County.

It is provided that the public schools in the County shall include elementary schools, that is, from grade one to six inclusive; junior high schools, grade seven to nine inclusive; and senior high schools, that is, grade ten to twelve inclusive.

Section 126, School Code, 1927, p. 55.

A study of the provisions of the School Code applicable to the County Board of Education discloses that it is charged with the operation and control of the public schools and the public schools are defined as above set out. I find no authority for the County Board of Education to expend public funds in establishing a junior college course.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 26, 1929.

The Judge of Probate,
Guntersville, Marshall County, Alabama.

Costs and fees: Judge of Probate not entitled to pay of County Treasurer when performing certain duties.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your recent request for an official opinion on the following question:

Suppose the county has no elected treasurer and the county depository does not perform the duties of the treasurer. then is the Probate Judge entitled to pay as county treasurer for the duties he is required to perform?

Replying to your question, I am of opinion that in the event there is no elected treasurer of the county and the county depository does not perform the duties of the county treasurer, the Probate Judge is not entitled to the pay of a county treasurer for the duties performed by him.

I assume from your inquiry that your county has a county depository but this depository for some reason does not perform the duties required of it by statute, and this opinion is based on this assumption. Your attention is directed to Article II, Chapter 17 of the Code of Alabama, 1923, and particularly to Sections 312, 318, 319 and 323 of said Article. Section 312 abolishes the office of county treasurer in all counties having a population of not less than fifty-five thousand. Section 318 charges county depositories with all duties and liabilities of county treasurers, and under Section 319

county depositories may maintain all actions and proceedings of every kind which county treasurers may maintain, and all actions and proceedings may be brought against county depositories which can be brought against county treasurers, including extraordinary and summary remedies or proceedings. Under the provisions of this Section of the Code a writ of mandamus lies against any county depository failing to discharge the duties imposed upon it by law.

First National Bank of Abbeville v. Terry, Briggs & Co., 203 Ala. 401.

Hasty, County Judge, v. Marengo County Bank, 206 Ala. 280.

There is no law providing for the payment of any salary or fees to the Probate Judge for performing certain duties required of him under Article II, Chapter 17, *supra*.

Section 3734, Code of Alabama, 1923, provides as follows:

"3734. No fee charged unless expressly authorized.—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer."

The Probate Judge when he accepts office takes it cum onere, and must perform its duties whether there is compensation attached to their discharge or not.

Hawkins ex rel F. P. O'Brien v. The State, 24 Ala. 102.

I am, therefore, of the opinion that the Probate Judge can receive no compensation for the discharge of the duties required of him under the provisions of Article II, Chapter 17, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 27, 1929.

The Treasurer of Jefferson County,
Birmingham, Jefferson County, Alabama.

Salaries—Employees of a court which was created by an Act held unconstitutional by the Supreme Court may not be paid salaries.

Opinion by Assistant Attorney General Knight.

Dear Sir:

I have your letter of June 15, 1929, in which you call my attention to the recent decision of the Supreme Court of this State holding that the Act creating the Court of Common Pleas in a certain portion of Jefferson County, Local Acts 1923, p. 346, is unconstitutional, null and void.

You inquire whether or not you are authorized to pay the salaries of employees of this court. I presume that you mean those salaries which have not been paid but are due to the date of the decision of the Supreme Court.

You direct my attention to Section 186, Code, of 1923, which provides, *inter alia*, that the court of county commissioners may make appropriations to compensate persons for **services** performed for the county under an Act of the Legislature which may subsequently be declared void by the Attorney General or the Supreme Court.

I am of the opinion that there is no authority to pay the salaries of the employees of this court.

The particular part of Section 186, which you suggest may furnish authority for such compensation, or a manner in which such persons may be compensated, provides compensation for **services**.

Services as used in the above mentioned Section of the Code cannot be extended to contemplate services which were not authorized by law to be performed. There was no authority of law for the performance of services by the employees of the court. There was no service to all intents and purposes.

A construction of the extent of the application of Section 186 of the Code, for the purposes of this inquiry, necessitates an inquiry into the question of whether or not these officers or employees were **de facto officers**. Had such officers been *de facto* officers the authorities are uniform to the effect that he might recover or be compensated for such services. In the instant case the officer is not a *de facto* officer.

No office was created. There is no such thing as a *de facto* office. That one may maintain an action of compensation or receive compensation there must, of necessity, have been an office in the first instance.

It would be a misapplication of terms to call one an officer who holds no office; a public office can exist only by force of law. An unconstitutional Act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; in legal contemplation, it is as inoperative as though it had never been passed.

Norton v. Shelby County, 118 U. S. p. 425.

I am aware of decisions of this court which hold that where the Act providing for the appointment of one is unconstitutional, that if the **office exists** one is a *de facto* officer holding a *de jure* office. I am also aware of the cases to the effect that where it was attempted to create a new judicial circuit by an unconstitutional Act, that the illegal appointee was a *de facto* officer.

Walker v. The State, 142 Ala. 7.

Ex parte State ex rel The Attorney General, 142 Ala. 87.

The decision in these cases is that the acts of such persons or officers are valid and binding.

The decision quoted above proceeds on the theory that there existed an office *de jure*. Neither of them, nor any other of the long line of decisions

which might be cited of the same import as those last cited, sanction the doctrine that there can be a de facto office under a constitutional government.

As to the salaries which have already been paid these officers, I am of the opinion that you had no right to inquire beyond their apparent authority. Furthermore you are rendered not liable for such payment under Section 869, Code of 1923. This Section provides that the written opinion of the Attorney General secured by a county officer legally entitled to secure such opinion, shall protect the officer to whom it is directed from liability to either the State or County on account of any official acts performed as advised in such opinion.

You received an opinion from this office, of date October 14, 1927, advising you that in my opinion this Act of the Legislature was constitutional.

By way of digression, I will state that the above referred to opinion of the office follows precisely the ruling of the Supreme Court in *Whaley v. Cohn*, 149 Ala. p. 316. Subsequent to the writing of this opinion the case of *Ensley v. Cohn* was overruled, in effect. The decision in the case overruling the *Ensley v. Cohn* case has been followed in the case of *Wilkinson v. Allen* (in *Mas.*). However, at the time the opinion was rendered to you on this subject the decision in the *Ensley v. Cohn* case, a perfect analogy, was controlling. In rendering an opinion, this office is bound by the decisions of the Supreme Court.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 27, 1929.

Judge of Probate,
Evergreen, Conecuh County, Alabama.

Warrant issued on gasoline tax fund by county officials may be void, and yet the claim for the payment of which the warrant was issued may constitute a valid debt against the county and be a part of debt of county limited by the Constitution.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letters of June 4th, June 7th, and June 19th were duly received. You wish an opinion from me to the effect that county warrants issued for road maintenance and drawn on the gasoline funds are not debts within the meaning of the constitutional provision creating debt limit for counties.

In reply will refer you to opinion rendered by me to the Judge of Probate of Pike County a copy of which you have.

That opinion answers your question as far as it can be answered upon the facts stated. If the County owes a debt which cannot legally be paid out of the gasoline tax fund, then I see no reason why it may not constitute a debt against the county, constituting part of the constitutional debt limit.

The fact that a warrant may have been drawn on the gasoline tax for payment of such debt is immaterial. Such debt would exist against the county though the warrant issued against the gasoline tax fund for its payment be void. In other words, the gasoline tax fund can be used for the purposes only, named in the following provision of Section 9 of Act No. 340, approved August 27, 1927 (Acts 1927, pp. 328, 329):

"Provided, however, that all the funds derived by the several counties from said tax shall be expended exclusively for maintenance and repair of roads, highways and bridges in said county. The use or expenditure of any of said funds in any other manner or for any other purpose than that provided herein, by the governing body of any county, or any individual member of said body, shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars and by imprisonment in the county jail or at hard labor for the county for not less than one nor more than twelve months."

Suppose your county bought, on credit, tractors, road machines, etc., and gave warrants on the gasoline fund to be paid when such fund subsequently received, shall be sufficient for the purpose. The warrant issued on such gasoline fund would be void, but the debt against the county for the price of such machinery would constitute part of the debt to be considered in ascertaining whether or not the County had reached or exceeded its constitutional limitation. The County, if not exceeding its debt limit, had the right to purchase the machinery on credit; but no right to pay such debt out of the gasoline tax fund. If a warrant for such purpose is issued on the gasoline tax fund, the warrant is void for the reason that such debt cannot be paid out of the gasoline tax fund, but the debt against the County would be valid and payable out of other funds, when received.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 27, 1929.

The Judge of Probate,
Wetumpka, Elmore County, Alabama.

Gasoline tax—Warrants may not be issued against anticipated pro rata of county from proceeds of gasoline tax levied by the State.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of June 12th.

You inquire whether or not a county may legally buy tractors and road scrapes to be used for the maintenance of county roads, and pay for the same with warrants issued against the gasoline tax, some of which warrants are payable on future dates.

I am of the opinion that no warrants may be issued against an anticipated revenue to be received by the county from the gasoline tax levied by the State. However, you may pay for the tractors, scrapes and road material to be used for the maintenance and upkeep of the county roads and bridges out of the county's share of this tax which has already accrued.

It was apparently the intention of the Legislature to restrict the counties in the use of the tax to current maintenance and upkeep of roads and bridges and that debts should not be created against the anticipated revenue from this source.

I am herewith enclosing a copy of a former opinion of this office of date May 29, 1929, to the Judge of Probate of Pike County to the above conclusion. This opinion has been quoted in an opinion of date June 24, 1929, to the Treasurer of Cleburne County, Book 12, Office Edition, Opinions of the Attorney General. I also enclose copy of an opinion of June 26, 1929, to Judge of Probate of Conecuh County which may interest you.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 28, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

County Treasurer Shelby County: Act creating office County Treasurer held constitutional.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of June 25th.

You inquire as to the validity of House Bill 973, Local Act 1919, p. 231, an Act providing for the creation of the office of County Treasurer of Shelby County.

I am of the opinion that the Act in question is valid. That the same in all respects was constitutionally passed and as passed is violative of no constitutional provision.

I find that notice of the intention to apply for the passage of the Act was published for four consecutive weeks prior to its introduction in the House of Representatives. Section 106 of the Constitution of 1901 in this respect was complied with.

See House Journal 1919, p. 1640.

The Act is not violative of Section 105 of the Constitution, as local legislation on a subject provided for by the general law.

The Supreme Court has repeatedly held that Section 105 of the Constitution prohibits local legislation only on subjects enumerated in Section 104.

State vs. Prince, 199 Ala. 444.
Board vs. Kayser, 205 Ala. 289.
Jackson vs. Sherrod, 207 Ala. 245.
Polynski vs. Wilhite, 211 Ala. 94.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 28, 1929.

Clerk, Circuit Court,
Florence, Lauderdale County, Ala.

Witness certificate—how paid when lost or mutilated.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 7, 1929.

You request my opinion:

Where a certificate for a witness has been issued and the witness comes in and states that he has lost his certificate, is there any authority of law for issuing to the witness a duplicate certificate after notifying the Bank that the original has been lost and instructing them not to pay the same?

In answer to your question, I am of the opinion that you may issue a duplicate certificate to the witness upon his making affidavit that the original certificate was issued to him, and that the same has been lost or destroyed.

Code of Alabama 1923, Section 7234,
Opinions of Attorney General, Oct. 4, 1928, (Office Edition) Vol. 8,
p. 21,

Code of Alabama 1923, Section 7245 (Civil Cases).

The fee docket of the Clerk of the Circuit Court will show to whom the witness certificate was issued and the amount due thereon, and an affidavit should be made by the holder of the certificate. You as Clerk should keep a copy of the affidavit and furnish the Bank or Depository a copy.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 28, 1929.

The Sheriff,
Linden, Marengo County, Alabama.

Fees: Sheriff entitled to fee of fifty cents for serving subpoena on witness to appear before grand jury where true bill is found in the case.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of June 21st.

You inquire whether or not the Sheriff is entitled to a fee for serving a subpoena on a witness to appear before the grand jury, where a true bill is found.

The Sheriff is entitled to a fee of fifty cents for each subpoena served upon a witness to appear before the grand jury where a true bill is found.

Section 3741, Code of 1923,
Board of Revenue vs. State, 172 Ala. 155,
Kilgore vs. Swindle, 122 So. 333.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 28, 1929.

The State Highway Department,
Montgomery, Alabama.

County property—Court of county commissioners may direct disposal of any real property of the county, which may lawfully be disposed of, and direct Probate Judge to make titles thereto.

Opinion by Assistant Attorney General Knight.

Dear Sir: Attention: Alabama Highway Director.

This is to acknowledge receipt of your letter of recent date.

You state that the Alabama Highway Department is endeavoring to secure rights-of-way for its highways in all counties of the State where the rights-of-way have been secured in the name of the county. You also state that you have prepared and mailed a form of deed to each probate judge of the counties concerned to be executed by him for the county in furtherance of such purpose.

You state it has been brought to your attention that in a certain county all road matters are in the hands of the board of revenue; that the probate judge is not officially connected with the board, and that it is his idea the president of the board of revenue should sign the deed when the conveyance is authorized by the board of revenue of the county.

You inquire as to who should execute the deed of such property of the county to the State.

The probate judge must, in obedience to an order entered on the minutes of the court of county commissioners or board of revenue, make title to such property by executing a conveyance in accordance with such order. Such conveyance invests the grantee with the title of the county to the property.

The fact that the probate judge is not connected with the board of revenue is of immaterial concern in the question of who should execute a deed for the county.

The statute provides specifically that the probate judge shall execute deeds for the county on the order of the court of county commissioners or board of revenue.

You were correct in sending the deeds to the various probate judges for their execution, which, of course, must be done pursuant to an order spread upon the minutes of the court of county commissioners or like governing body.

Section 209, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 29, 1929.

The Judge of Probate,
Wetumpka, Elmore County, Alabama.

Paupers—Burial of paupers by county.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of May 13, 1929. You request my opinion:

Is the Court of County Commissioners authorized to pay the expense of burying a pauper who does not reside at the county almshouse at the time of his death?

In my opinion the Court of County Commissioners is authorized to pay the above expense.

The Court of County Commissioners or Board of Revenue shall relieve, support or employ paupers found or being in the county, though not entitled to a settlement therein, and in case of their decease shall decently bury them and the Court of County Commissioners or Board of Revenue, shall decently bury all indigent strangers dying in the county.

Sections 2790 and 2791, Code of Alabama, 1923.

Section 25 of an Act approved Sept. 9, 1927, (General Acts 1927, p. 527).

You will observe that the above Sections of the Code of 1923 and Section 25 of the Act approved Sept. 9, 1927, provide that the County shall bury all paupers found or being in the county and not merely those paupers who are inmates of the county almshouse at the time of their decease.

I rendered an opinion on April 22, 1927, to the Judge of Probate of Bibb County, (Biennial Report of Attorney General, 1926-1928, p. 167) in which I held that it is the duty of the county to decently bury all paupers or strangers found or being in the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 29, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Where a corporation has existed under the laws of Alabama for a period of years, and, after expiration of period of time limited by charter, continues to operate and exercise the powers of the original franchise, holding itself out to the world as a corporation, and no objection thereto is made by the State, it is estopped, for all purposes, from denying its corporate existence during such period subsequent to period of time limited in its charter.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of April 5, 1929, is acknowledged. You make the following statement of facts:

On February 19, 1903, there was organized, at Anniston, Alabama, under the provisions of Article 11 of the Code of Alabama, 1896, a corporation under the name of Scarbrough Drug Company, to have succession by said corporate name for a period of twenty years. Upon said organization, it began to do business in said City of Anniston and such business was conducted under said name as a corporation from the date of organization through the calendar year 1928 and into the calendar year, 1929. In the time and manner provided by law, one B. L. Snellgrove, as its vice president, as required by law for such corporations, returned to the State Tax Commission, for assessment, the share of capital stock of said Scarbrough Drug Company. There was no change of name, or of its attitude to the public, and it functioned under the management of officers in every respect as a corporation.

After the State Tax Commission had placed a value on the shares of stock for assessment and had given notice to said vice president of the valuation, the attorneys for said Scarbrough Drug Company discovered that the twenty year period provided in Section 1256 of said Article

11 of the Code of 1896 expired on February 19, 1923, and claimed that the shares of stock were not taxable. The State of Alabama has never proceeded in any way to oust the corporators.

You wish my opinion as to whether or not such capital stock was liable to assessment for **ad valorem** taxation as of October 1, 1928.

In reply to your inquiry will say that, in my opinion, said capital stock was liable to assessment for taxation as of October 1, 1928. As said by our Supreme Court in the case of Central Agricultural and M. Ass'n. vs. Alabama G. L. Ins. Co., 70 Ala. 133:

"If the state acquiesce in the usurpation, it is not for individuals to complain. The corporation exists *de facto*—is subject to all the liabilities, duties and responsibilities of a corporation *de jure*."

If on and after October 1, 1928, Scarbrough Drug Co. was holding itself out and dealing with the world as a corporation, its period of succession under the corporate name as authorized by Section 1256 of the Code, 1896, having expired, continuing to exercise the franchise formerly granted to it—to which no one could object except the State of Alabama—and the State of Alabama has never interposed an objection, it is, in my opinion, estopped from denying its corporate existence at that period of time for any purpose.

Corpus Juris, Vol. 14, Section 274, p. 247;

Central Agricultural & N. Assn't vs. Alabama G. L. Ins Co., 70 Ala. 120;

Snider's Son's Co. vs. Troy, 91 Ala. 229;

Bibb vs. Hall, 101 Ala. 96;

Harris vs. Gateway Land Co., 128 Ala. 657.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 29, 1929.

Clerk, Circuit Court,
Wedowee, Randolph County, Alabama.

1. Trial Tax in Civil Cases—case should be docketed after service of process. Trial tax should be charged as cost upon docketing of civil case.

2. Recognizance—recognizance is an obligation of record in the nature of a conditional judgment for which the Clerk is entitled to fifty cents for entering of record.

3. Fine and Forfeiture Fund—where forfeitures have been taken conditionally and set aside, without payment of cost, against defendant and bail against witnesses and jurors, fees of the Sheriff and Clerk, are

not a charge against the fine and forfeiture fund. But if judgment is against the county the officers are entitled to fees to be paid by the county.

4. Fees—sheriffs entitled to commissions on forfeitures collected under execution under the same schedule as in civil cases.

5. Fees—Circuit Clerk not entitled to fees for issuing subpoenas for witnesses before the grand jury when no bill is returned.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of recent date. You inquire whether or not the trial tax shall be charged as costs in a case where a settlement is made of the case upon service of process and before the case has been placed upon the docket.

You also inquire as to just what is meant by recognizance as used in Section 3739, Code of Alabama, 1923.

You also inquire whether or not in cases where forfeitures have been taken conditionally, at a term of court, and at a subsequent term of court the forfeitures have been set aside against defendants and bails, witnesses, and jurors, the fees of the Clerk and the Sheriff are a charge against the fine and forfeiture fund or a charge against the county.

You inquire whether or not Sheriffs are entitled to commissions on forfeitures collected by him under an execution in criminal cases under the same schedule as in civil cases.

Your last inquiry is whether or not the Clerk is entitled to fees for issuing subpoenas for witnesses before the grand jury where no bill is returned.

In answer to your first question, I am of the opinion that immediately upon the filing of a complaint in a civil case the cause should not be docketed but should be docketed only upon the return of the Sheriff as to how he has executed the process. Section 6724, Code of Alabama, 1923, provides that it is the duty of the Clerk to keep a trial docket of all civil cases in which must be entered all civil cases **standing for trial at each term of court**. It would be an impossibility to docket such a case within contemplation of the third paragraph of the section of the code above referred to until the clerk was advised by the Sheriff of the service of the process. The Clerk would have no means of knowing, until return was made by the Sheriff, that the case would stand for trial at any particular term of court.

Section 4½ of an Act approved September 15, 1919, (General Acts, 1919, p. 284) provides that the trial tax shall be collected in each case that goes upon the docket of the circuit court. This contemplates both criminal and civil cases but it must contemplate only such cases as are docketed. This was a tax imposed by the Legislature upon litigation. Where no docket is made of the case neither litigant becomes liable for the trial tax. Had the Sheriff's return been made and the cause set for trial on the docket for some term of court then the tax should have been collected.

In answer to your second inquiry, this is to advise you that a recognizance as used in Section 3739, Code of Alabama, 1923, contemplates a record made of an obligation undertaken by the defendant or by the defendant and his surety and when entered of record it imports verity and is in the nature of a conditional judgment.

A recognizance differs from a bail bond merely in the nature of the obligation created. A bail bond creates a new obligation. A recognizance is acknowledgment of existing debt and where condition is broke the debt becomes absolute.

Calhoun vs. Gray, 131 S.W. 478.

In answer to your third inquiry I will state that there is no provision of law for charging the clerks' and sheriffs' fees in cases of forfeitures taken against defaulting defendants and their bail or against witnesses and jurors, where the forfeiture is subsequently set aside, against the fine and forfeiture fund of the county. In cases against defendants and their bail, however, if the county is the beneficial plaintiff and judgment is rendered against it for costs the officers are entitled to fees incurred thereby.

Coosa Co. vs. Parker, 83 Ala. 269.

The fine and forfeiture fund of the County can be charged with fees and costs only as is expressly provided by law. Section 4039 of the Code of Alabama, 1923, provides how officers may charge their costs and fees against the fine and forfeiture fund. There is no provision for a charge against such fund of the fees in cases of the character mentioned by you and under the circumstances mentioned by you. The County is liable for costs and fees only to the extent and in the manner provided by law.

Tolbert vs. Hale County 131 Ala. 143.

Answering your fourth inquiry it suffices to state that Section 3741 of the Code of 1923 specifically provides that sheriffs are entitled to commissions on forfeitures collected by him on execution under the same schedule as in civil cases.

Answering your last question I will state that the clerk cannot collect fees for issuing subpoenas for witnesses before the grand jury where no bill is returned either from the general funds of the County or the fine and forfeiture fund of the County.

Kilgore vs. Swindle, 122 So. 333.

Of course since there is no fund from which such fee might be paid there is no manner in which the Clerk may be paid for such services.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 1, 1929.

Solicitor of First Judicial Circuit,
Chatom, Washington County, Ala.

Stock Law elections—voting stock law for entire county.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of May 13, 1929. You state that a petition has been presented to the Court of County Commissioners, asking that an election be held to determine whether or not hogs will be permitted to run at large.

You request my opinion:

Must the Court of County Commissioners call an election for each precinct in the county or can the election be called for the entire county?

I understand from your letter that you desire to know if the majority of the voters of each precinct must vote in favor of the stock law in order for the law to apply to the whole county.

In my opinion a majority of the voters of each precinct is not required. In my opinion if a majority of the votes cast in the entire county are for the stock law, then the law is applicable to the whole county and the fact that a precinct or certain precincts cast a majority vote against the stock law will make no difference.

Section 10212, Code of Alabama, 1923, provides that if a majority of the votes cast shall be for "stock law, Yes", it shall thereafter be unlawful for stock to run at large in the precinct or precincts. After careful considering the provisions of this section and the opinion of the Supreme Court in the case of *State ex rel Potts v. Court of County Commissioners of Lauderdale County*, 98 So. 562, I am convinced that a majority of the total vote cast in the entire county is all that is required.

You will observe that whenever a stock law election is held for the entire county, no petition is necessary:

Almon v. Court of County Revenues of Lawrence County, 60 So. 894.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 3, 1929.

The Alabama Highway Director,
Montgomery, Alabama.

Highway Department—payment of money due on final estimate to contractor.—where several claimants are claiming the money and Highway Department is in doubt as to which one is legally entitled to the money, it should hold money until rights of parties are determined under Section 10390 of the Code.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of June 11, 1929, in which you submit the following statement of facts:

"On the 10th day of December 1928 this department entered into contract with the Winter Construction Co. for the construction of culverts on State Project 304—Coosa-Chilton Counties.

"On January 16, 1929 the Winter Construction Company executed the attached assignment to the First National Bank of Goodwater, Alabama, covering all money due and to become due on this contract. This department, through its auditor, duly acknowledged and accepted this assignment and proceeded to mail all checks to said bank.

"Now, on final settlement with the Winter Construction Co. on this project, there are numerous claims presented against the contractors and bond company and at the request of the Bond Co., the United States Fidelity & Guaranty Co. and consent of the contractors, the Winter Construction Co., the State Auditor with the approval of this Department issued his warrant covering final settlement to the Winter Construction Company and the United States Fidelity & Guaranty Company, jointly. The amount of the warrant was \$9252.11. I now have this warrant and am holding same, as the First National Bank of Goodwater is claiming the check on their assignment and the Bond Company claims that on account of numerous claims being filed on this project that the warrant should be paid as drawn. They claim that the claims filed, under Section 28 of the Highway Code, are prior liens on this money and the warrant should be delivered to them, with the consent of the contractors.

"The Bond Company states if we will deliver the warrant to them, they will furnish this Department with a bond guaranteeing that settlement will be made with the bank and all claimants after the bank and claimants have proven their claims in court. They state they will deposit this warrant and hold same until suits are brought and proper disposition of the money is determined."

Under your statement of facts you have in the hands of the Highway Department the sum of \$9252.11, which is due the Winter Construction Company as final estimate on a contract for the construction of culverts on State Project 304 Coosa-Chilton Counties, and that you have a written as-

signment executed by Winter Construction Company to the First National Bank of Goodwater, and that said bank is now demanding payment of the above sum of money, which is in the hands of the Highway Department. You further state that numerous claims have been entered against the contractors and the bonding company. Under the above recited facts you are in doubt as to who you should legally pay the money to in view of Section 28 of the Highway Code of 1927.

I am of the opinion that you should require a strict compliance with said Section 28 by all parties concerned, and after a compliance with said Section, you are in doubt as to who is legally entitled to the money which is in the hands of the Highway Commission, you should not pay the money to any of the claimants, but hold the money subject to a decision of the court had under Section 10390 of the Code of Alabama, which is as follows:

"10390. ACTION IN NATURE OF INTERPLEADER.—Whenever any person has, or is alleged to have, any money or other property in his possession which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader, to any court which by law has equitable jurisdiction of the parties and amount in controversy, making all persons parties who claim to be entitled to or interested in such money or other property. Said court shall hear and determine all questions which may arise in the case, may tax costs at its discretion, and, under the rules applicable to an action of interpleader, may allow to one or more of the parties a reasonable sum or sums for counsel fees and disbursements, payable out of said fund or property; but no such allowance shall be made unless it is claimed by the party in his complaint or answer."

After proceeding being had under the above quoted Section, you will then pay out the money in accordance with orders of the Court and thus be relieved of any liability for illegal payment of the money claimed by the several claimants.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 5, 1929.

The County Solicitor,
Goodwater, Coosa County, Ala.

Habeas Corpus—State has no right to appeal from judgment admitting defendant bail in capital case where the defendant was not held under an indictment by the grand jury.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of June 13.

You state that a certain defendant was arrested under a warrant which was issued on an affidavit charging a capital offense by a justice of the

peace. The offense charged was a capital offense. You also state that the defendant prosecuted the writ of habeas corpus before the probate judge who allowed bail in the sum of \$1,000. You mention numerous rulings of the judge of probate upon evidence submitted by the defendant, and arguments made by the defendant's counsel.

You inquire whether or not the State under the circumstances mentioned by you may appeal and whether or not pending such appeal judgment of the probate judge should be suspended.

Under the circumstances set out by you the State has no right of appeal. This answers also your inquiry as to the suspension of the judgment admitting the defendant to bail.

The State may only appeal where the defendant is discharged or where the defendant is held under an indictment returned by the grand jury charging a capital offense and is admitted to bail.

State v. Berkstresser, 137 Ala. 109.

By "discharging from custody" is meant an unqualified discharge, and an admission to bail is not such a discharge.

Authority, *supra*.

As to a ruling made upon evidence by the probate judge in trying a writ of habeas corpus you are not concerned, for the statute provides that no bill of exceptions may be taken in such cases and the appellate court only reviews the case as to the sufficiency of the evidence. However, in the instant case, the State has no right to appeal.

Act approved June 16, 1927 (General Acts, 1927, pp. 76-77).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 5, 1929.

Tax Assessor,
Guntersville, Marshall County, Alabama.

Assessment of household property to the value of \$150.00 must be made before exemption allowed.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 18, 1929, in which you request my opinion:

Should assessment be made by property owners of household goods to the value of \$150.00 to be entitled to the exemption allowed by law?

In answer to your question, I am of the opinion that the taxpayer or owner of household goods to the value of \$150.00 must come in and assess such property under oath before such exemption can be allowed.

Subsection 9, Section 3022, Code of Alabama, 1923.
State Bank vs. Board of Revenue, 91 Ala. 217.

Subsection 9 of the Code, *supra*, reads in part as follows:

" * * * Provided that no property or subject of taxation mentioned in this subsection shall be exempt from taxation nor shall any credit, abatement, or reduction be allowed therefrom unless such property or subject of taxation is entered by the taxpayer upon an assessment list and returned by him under oath to the Tax Assessor."

This quoted part of subsection 9 is as plain as can be written. Therefore, it is the duty of the person claiming the exemption to first assess his property under oath before the same can be allowed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 5, 1929.

Clerk of the Circuit Court,
Enterprise, Coffee County, Alabama.

Appeals—criminal cases.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 1, 1929, in which you state that you have a number of criminal appeal cases pending before the Court of Appeals and that no effort has been made to perfect a bill of exceptions. You further state that the appeals were for the purpose of postponing the serving of sentence as long as possible.

You request my opinion:

1. Could these appeals be dismissed after the time limit expires if your office was given proper notice of the defendant's failure to prepare and submit his bill of exceptions?

2. If a defendant waives trial by jury and interposes a plea of guilty as charged, can he then take an appeal to the Court of Appeals, no exceptions having been taken to the rulings of the trial court by the defendant, could his appeal be dismissed at an early date through notice to your office of these facts, and what form of notice should be given it?

In answer to your first question, I am of the opinion that the defendant has a right to appeal on the record and his failure to file a bill of exceptions would in no wise prevent the taking of an appeal.

Ex parte Mancil, 116 So. 908.

In answer to your second question, I am of the opinion that the defendant can appeal his case to the Court of Appeals notwithstanding he has reserved no exceptions to the ruling of the trial judge and has waived trial by jury and has interposed a plea of guilty.

Ex parte Mancil, supra.

Under the first question submitted by you, a defendant has ninety days from sentence to prepare and submit a bill of exceptions to the trial judge. The trial judge has sixty days to approve said bill of exceptions and the clerk has twenty days in which to prepare the record. The defendant has the right to appeal without a bill of exceptions. He may elect to appeal with or without the suspension of sentence at the time the judgment is rendered. As was said by Mr. Justice Brown in the Mancil case, supra:

"* * * the taking of the appeal and the election by the defendant to have the execution of the sentence suspended, made known to the court, supplies the statutory invocation requiring the exercise of the trial court's power to sustain the execution of the judgment pending the appeal and to allow the defendant bail, in bailable cases, as a matter of right."

Whether or not the record presents reviewable questions is for the consideration of the Court of Appeals or the Supreme Court in disposing of the appeal and is not for the trial court.

Under your second question the failure of the defendant to reserve exceptions to any of the rulings of the trial court or his waiver of a trial by jury, and in fact his plea of guilt would not prevent his right of taking an appeal to the appellate court. The right of an appeal is secured by statute and as was said in the Mancil case, supra, he cannot be denied that right. It may be said that this statutory system of review is too liberal to the accused, and detrimental to the due and orderly enforcement of the criminal law, if that be so, the responsibility, as well as the remedy, is with the Legislature, and not the courts. This office is diligent in moving to dismiss all appeals improperly taken and no notice is necessary except the mailing of a copy of the record by you as Clerk, to the Attorney General as is required by statute.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 5, 1929.

The Judge of Probate,
LaFayette, Chambers County, Ala.

Constitutionality—Act approved September 6, 1927 (General Acts, 1927, p. 674).

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of March 29, 1929, in which you state that you have had several inquiries of late as to an Act of the Legislature approved September 6, 1927 (General Acts, 1927, p. 674).

You request my opinion:

Is the Act constitutional?

In answer to your question, I am of the opinion that the Act approved September 6, 1927 (General Acts, 1927, p. 674), is within the legislative competency and does not violate the Constitution of 1901.

Woco Pep Co. of Montgomery v. City of Montgomery, 105 So. 214;
W. E. Fuqua doing business as Fuqua Grocery and Grain Company
v. City of Mobile (mss).

Under the Fuqua case, *supra*, both the Appellate and Supreme Court have decided the constitutionality of the Act hereinabove cited. That being so, this office is bound by the rule of *stare decisis*, and I, therefore, conclude that the Act is constitutional and that a municipality would have a right to levy a license tax for any business, trade, or profession done within the police jurisdiction of such municipality and within the corporate limits thereof, provided, however, that the amount of such license shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 5, 1929.

Clerk of the Circuit Court,
Gadsden, Etowah County, Ala.

Certificate of judgment—When issued by the clerk fee must be paid by party requesting same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 24, 1929, in which you state that as clerk of the circuit court you are frequently called on to issue certificates of judgments for which you are allowed by law a fee of fifty cents.

You request my opinion:

Is this a charge to be taxed as other costs and assessed against the defendant?

It is my opinion, it is not. All the cost that can be charged against the defendant where a judgment is rendered against him is the cost which is incident to the procuring of the judgment. When the judgment is obtained the cost of the suit ends, and if the plaintiff desires a certificate of the judgment in order to have the same recorded, then he must pay the fee for the certificate which the clerk issues. The plaintiff in procuring this certificate

of judgment, does so in order to have same placed on record, which then becomes a lien on all the property of the defendant. It is an independent and separate matter from the cost of the suit, and, therefore, he is required to pay the clerk for the issuance of this certificate.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 5, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Exemptions—property not used exclusively for school purposes.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 3, 1929, with enclosure wherein it is stated that the Master School in DeKalb County was instituted about five years ago and that one M. W. Howard acquired approximately eight hundred acres of land and erected two small dormitories. That he attempted to run the school for about three months. You further state that for the past three years the school has not functioned in any way and that located on this property is what is known as the "East River Park Addition" cut up into many lots and being sold to people from various parts of the country. Also erected thereon is a club house known as "Alpine Lodge." It is further stated that the acreage and a number of summer huts are rented to various parties and that Mr. Howard refuses to list the property for taxation.

You request my opinion:

Is such property which is not used for school purposes subject to ad valorem taxation, and if so, should the same be placed on the assessment books for taxation?

In answer to your question, I am of the opinion that this property is subject to taxation and that the tax assessor should proceed to place the same on the tax books.

Section 91, Constitution 1901;
Anniston City Land Co. v. State, 185 Ala. 482, 64 So. 110;
State v. Church of Advent, 208 Ala. 632.

Under Section 91 of the Constitution, *supra*, use and not ownership is the test of the exemption. To bring this property within the terms of the exemption provided by the Constitution involves three things. First, that the property is used; Second, that it is used for educational purposes; and Third, that it is used for no other purposes.

It was held in *State v. Church of Advent*, supra, that “* * * exclusive use, irrespective of ownership, was, under the provision of the Constitution, the test of the right of exemption. Under such construction, therefore, the question of ownership becomes immaterial, but the matter of exemption is rested upon the use to which the property is put.”

In *Fitterer v. Crawford*, 157 Mo. 51, 57 S. W. 532, cited with approval by the Supreme Court of Alabama construing similar language, it was said, “there is a very material difference between the use of a building exclusively for purely charitable purposes and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it, within the meaning of the statute, but, in order to use it, it must be occupied or made use of.”

In the case of *Washburn College v. Shawnee*, 8 Kans. 344, cited with approval in *State v. Church of Advent*, it was said “* * * nor is ownership evidence of use. Full possession and proof of title are consistent with total failure to use. This is too plain to need either argument or illustration. If the framers of the Constitution had intended to exempt all property belonging to literary and charitable institutions from taxation, the language employed would have been very different.”

The fact that they ignored ownership, and made use the test of exemption, shows clearly that they recognized the essential distinction between the two, and established the latter rather than the former as the basis of exemption. I, therefore, conclude that any property owned by the Master School or M. W. Howard in charge of the Master School, let for rent or used for purposes other than for school purposes should be placed upon the assessment book for taxation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 6, 1929.

The State Health Officer,
Montgomery, Alabama.

Meat Inspection and promotion of abattoir construction.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of June 12, 1929. You state that the State Board of Health has as a member of its staff a graduate veterinarian (A. P. I. 1913), who is in charge of meat inspection and the promotion of abattoir construction. This particular member of the staff of the State Board of Health is qualified both by training and experience for the work to which he is assigned. His duties consist of promoting before city councils and local officials the establishment of meat inspection service, and the construction of sanitary slaughter pens of packing plants, and assisting local meat inspectors in such

technical problems as may arise. Said assistant, you further state, treats no animal diseases and makes no tuberculin tests, his sole duty being as outlined above. The assistant's right to hold this position has recently been questioned, because of the fact that he has not procured a license to practice veterinary medicine.

You request my opinion:

Is this man, while in the performance of his official duties as hereinabove set forth, engaging in the practice of veterinary medicine, and, therefore, illegally employed unless he appears before the State Board of Veterinary Examiners and obtains a license to practice veterinary medicine?

In answer to your inquiry, it is my opinion that said member of the staff of the State Board of Health is not required to take out a license to practice veterinary medicine in order that he may legally perform the duties to which he has been assigned. Section 1255, Code of Alabama, 1923, reads as follows:

"1255. Who may practice veterinary medicine.—No person who is not a holder of a license or permit from the state board of veterinary medical examiners, and no person who fails to have his license annually renewed shall engage in the practice of veterinary medicine and surgery for hire in the State of Alabama."

In my opinion, the duties which this man is now performing do not constitute the practice of veterinary medicine within the contemplation of the Act immediately above quoted.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

Superintendent of Education,
Moulton, Lawrence County, Alabama.

Schools—State aid not given unless title to property vested in County Board of Education or in the State.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of June 11, 1929. You refer to my letter of June 6 to you and to Section 381, School Code 1927.

You request my opinion:

Must a deed be executed to the County Board of Education before State aid can be secured on equipment for a school?

In my opinion, a deed must be made to the County Board of Education or to the State before State aid is given on equipment for a school.

Section 95, School Code 1927, provides that title to all school property is vested in the County Board of Education.

Section 381, School Code 1927, provides for State aid for rural schools. Said section also provides that when application is made for the repair or for the equipment of any building the title to the property may be vested in the County Board of Education. In my opinion, this provision is intended to show that the title may be vested in the County Board of Education instead of in the State or the State Board of Education, and in my opinion State aid cannot be given to any school unless the title to the property is vested in the County Board of Education or in the State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Chairman,
Board of Revenue and Road Commissioners,
Mobile, Mobile County, Alabama.

Court of County Commissioners—No authority to employ patrolmen under Section 157, Alabama Highway Code.

Opinion by the Attorney General.

Dear Sir:

I have your letter of June 8, 1929. In it you invite my attention to Section 157 of an Act approved August 23, 1927, known as "The Alabama Highway Code." I gather from your letter that under this section, the Board of Revenue and Road Commissioners of Mobile County is endeavoring to employ traffic officers or patrolmen, for the reason that, attached to your letter is a blank form of summons apparently used by one of such officers, who styles himself an arresting officer.

You request my opinion:

Under Section 157 of an Act approved August 23, 1927, known as "The Alabama Highway Code," has the Board of Revenue and Road Commissioners of Mobile County authority to employ persons who have authority to act as traffic officers?

In answer will state that said Board has no such authority under said section of said Act,

You will observe that by said Section the Board has authority to establish, promulgate and enforce rules and regulations, but the authority to enter into contracts relates only to building, constructing, making, improving and maintaining the public roads, bridges and ferries of the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

State Board of Administration,
CAPITOL.

Costs and fees: Clerk not entitled to fee unless subpoena for witness properly issued, and sheriff not entitled to fee for service of subpoena on himself.

Opinion by Assistant Attorney General Cobb.

Attention: Mr. Hamp Draper, Associate Member.

Gentlemen:

I have your letter of June 15, 1928, enclosing copy of a letter from Mr. A. H. Shepperd, Clerk of the Circuit Court of Calhoun County. It appears from said correspondence that the Circuit Clerk of Calhoun County is charging fees for issuing subpoenas to the sheriff in criminal cases, and the sheriff is charging fees for serving subpoenas on himself, and making return on the same.

You request my opinion:

1. Is the Circuit Clerk entitled to a fee for issuing a subpoena for the sheriff of the county?
2. Is said sheriff entitled to a fee for serving a subpoena on himself?

Answering your first question, I am of the opinion that the clerk is entitled to a fee for issuing a subpoena for the sheriff of the county as a witness, provided the said clerk in issuing said subpoena delivers the same to the coroner of the county for service upon the sheriff. A subpoena for a witness has not been duly issued until the same has been delivered by the clerk to the proper officer to be served, and in the event it is necessary to issue a subpoena to the sheriff, it becomes the duty of the clerk under Section 162, Code of Alabama, 1923, to deliver said subpoena to the coroner of the county for service upon the sheriff, and whenever the circuit clerk has done this, he is entitled to the fee for issuing said subpoena.

Answering your second question, I am of the opinion that the sheriff is not entitled to a fee for serving and returning a subpoena on himself. A sheriff may be entitled to a witness fee when duly and properly summoned, just as any other witness, but in order to properly summon a sheriff as a witness the subpoena must be served on him by the coroner. The sheriff

of the county is not necessarily an official prosecuting witness. It is true he is the chief law enforcement officer of the county, and as such is charged with the duty of investigating all crimes and apprehending all offenders against the law, but there is nothing in the statute which expressly requires him to appear as a prosecuting witness unless duly and properly summoned.

Opinions of Attorney General, 1920-22, p. 445.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Tax Collector,
Scottsboro, Jackson County, Alabama.

Construction of Section 416 of Revenue Act 1919, (General Acts 1919, p. 449).

Opinion by Assistant Attorney General Evans.

Dear Madam:

Receipt of your letter of May 20th is acknowledged. You state the following as facts:

On October 1, 1926, and on October 1, 1927, certain lands lying in Jackson County, Alabama, belonged to one Sparks. Sparks failed to return this land for assessment for either of the tax assessment years beginning on said dates. This land was, during the year 1928 assessed to Sparks for each of said tax assessment years as an escape. This assessment has not been paid. Sparks now owns personal property which is under mortgage for about its full value. Sparks returned this personal property for assessment and has paid the taxes assessed to him on it.

You wish to know if you can now levy on and sell this personal property for taxes assessed to Sparks on said land.

In reply will say that if Sparks owned the personal property in question at any time during the tax assessment year beginning October, 1926, the lien for taxes assessable to him for that year became superior to all other liens then existing upon such property and such tax lien continues until the taxes are collected, no matter how many subsequent mortgages are executed thereon; and such property may be sold by the Tax Collector for collection of such taxes. The same is true as to taxes assessable during the tax assessment year beginning October 1, 1927.

Revenue Act 1919, Section 416 (General Acts, 1919, p. 449).

Escaped taxes are referable to the tax assessment year in which they should have been returned by the tax payer for assessment.

If the personal property which you refer to, as having a mortgage on it, was owned by Sparks at any time from October 1, 1926, to September 30, 1927, you may sell it for taxes assessed to him as of that year. If such property was owned by Sparks at any time from October 1, 1927, to October 1, 1928, you may sell it for taxes assessed to him as of that year.

If the personal property owned by Sparks was acquired by him subsequent to September 30, 1928, and a mortgage has been given on it by him to secure an amount equal substantially to its value, you may then proceed to sell the land in question for said taxes due, reporting to the probate court as provided in Section 240 of the Revenue Act, 1919, (General Acts 1919, p. 352).

The lien for ad valorem taxes does not extend to property acquired subsequent to the year in which such taxes are assessable, so as to make the tax lien superior to all other liens upon such property.

Yarbrough Bros. Hardware Co. v. Phillips, Tax Collector, 209 Ala. 341.

The meaning of the foregoing is that the lien for state and county ad valorem taxes on property owned by a tax payer during any tax assessment year, for the taxes assessable during such year, is superior to all other liens on such property. There is no lien for state and county taxes assessable during a certain tax assessment year, on property acquired by the tax payer subsequent to such tax assessment year.

If you do not understand what I have written, please read carefully said Section 416 cited and the case of Yarbrough Bros. Hardware Co. v. Phillips, Tax Collector, also cited in the foregoing opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Judge of Probate,
Fort Payne, DeKalb County, Alabama.

Officers—County Superintendent of Education—where selected under general law must be qualified elector of State. Local Act approved Sept. 19, 1923, (Local Acts 1923, p. 211) concerning County Superintendent of Education, construed.

County Board of Education—entering into agreement with Court of County Commissioners for employment of Attendance Officer and Child Welfare Worker combined.

Opinion by the Attorney General.

Dear Sir:

You have propounded to me for answer the following questions:

1. Under the general law, as set forth in the Alabama School Code

of 1927, must a county superintendent of education be a qualified elector of the State?

2. Under the Local Act approved Sept. 19, 1923, (Local Acts 1923, p. 211) providing for the election of a county superintendent of education for DeKalb County, etc., must the county superintendent of education elected in accord with said Act be a qualified elector of the County of DeKalb and of the State of Alabama?

3. Is it legal for the county board of education and the court of county commissioners to enter into an agreement for the employment of a Child Welfare Worker and Compulsory Attendance Officer combined, where there is no County Board of Child Welfare?

In answer to your first question will state that a county superintendent of education appointed by the county board of education, under the provisions of the Alabama School Code, 1927, need not be a qualified elector of the county in which he serves, unless the county board of education requires such qualification as a condition precedent to his appointment, which it may do. However, a county superintendent of education, appointed by a county board of education, under the general law, as carried in the Alabama School Code, 1927, must be a qualified elector of the State of Alabama and of some county in it before he is eligible for appointment by the county board under said law.

Sections 138, 139, School Code, *supra*.

A county superintendent of education whether appointed by the county board of education under the general law aforesaid, or elected by the people of the county under some local Act, holds a civil office of profit under this State.

Opinions Attorney General, 1926-1928, p. 179.

A county superintendent of education holds office "under the authority of this State."

Section 2575, Code of Alabama, 1923, dealing with persons ineligible to office, provides in part, as follows:

"The persons who are ineligible to and disqualified for holding office under the authority of this State are—

1. Those who are not qualified electors, except as otherwise expressly provided.

2. Those who have not been inhabitants of the State, County, District or Circuit for the period required by the Constitution and laws of the State."

Under the general law, a county board of education appoints a county superintendent of education for a definite term of office at a definite salary, which may not be increased nor diminished during his term, regardless of any legislative provision to the contrary, especially in view of Section 175, Constitution of 1901, which also prescribes the exclusive mode or manner for his removal from office.

Sections 138, 139, School Code, *supra*.

By Section 139, School Code, *supra*, which became effective Sept. 30, 1927, it is provided that a county superintendent of education need not be a qualified elector of the county in which he serves. This provision was written into the law after the rendition of an opinion of May 6, 1927, by the Attorney General, in which he had held that, under the general law, and in view of Section 2575, Code of Alabama, 1923, a county superintendent of education had to be a qualified elector of the county in which he was appointed by the county board, and no doubt said provision of said Section 139 of the School Code was written into the school law by the Code Commissioner who compiled said Code, with a view to circumventing the aforesaid opinion. However, the language of said provision of Section 139, *supra*, was not so explicit as to effect a complete exemption of county superintendents of education from the provisions of Section 2575, Code of Alabama, 1923. In other words, while it is true that a county superintendent of education appointed by a County Board of Education, under the general law, need not, in view of the last sentence of Section 139, School Code, 1927, be a qualified elector of the county in which he serves, yet, in view of Section 2575 of the Code, *supra*, it is compulsory as a condition precedent to his eligibility for appointment and his eligibility to continue in office, that he be a qualified elector of the State and some county in the State, as contemplated by subsections 1 and 2 of said Section 2575.

In this connection I also invite your attention to Section 2576, Code of Alabama, 1923. This section first requires that all officers of the State or those holding office under authority of the State must reside in the State and keep their offices in such places as are or may be designated by law. This is my interpretation of the meaning of this Section.

In answer to your second question, the County Superintendent of Education of DeKalb County, is selected in accord with a Local Act approved Sept. 19, 1923, (Local Acts 1923, p. 211). Section 1 of said Act prescribes that he shall be elected by the qualified electors of said County. Section 2 prescribes the term of office of such officer. Section 3 prescribes the minimum and maximum compensation for such officer to be fixed by the County Board of Education. Section 4 prescribes certain of the qualifications necessary for eligibility to the office. Section 5 prescribes the method of filling a vacancy and also prescribes the method of removal, the latter provision being unconstitutional. Sections 6 and 7 prescribe and define certain of his duties. The main purpose of this Act was to provide a different method of selection of the County Superintendent of Education of DeKalb County than that provided under the general law. Under this Local Act, a person seeking said office must be qualified to participate in both a primary and general election. The qualifications for an elector are prescribed in the Constitution.

(Section 178, Constitution of Alabama, 1901, and see other Sections under Article VIII of said Constitution.)

By Section 183 of the Constitution no person shall be qualified to participate in a primary election, party convention, mass meeting, etc., who does not possess the qualifications prescribed for an elector under Article VIII of said Constitution.

Therefore, construing all of these constitutional provisions together, and in the light of Sections 2575 and 2576, Code of Alabama, 1923, I am of the opinion that the County Superintendent of Education of DeKalb County must be a qualified elector of DeKalb County in order to be eligible for or to hold the office of county superintendent of education of said county.

In answer to your third question, will state that under the provisions of Section 317, Alabama School Code, 1927, the county board of education and the court of county commissioners may jointly employ persons as attendance officers for those attendance districts of the county over which the board has jurisdiction. The salaries of such attendance officers are paid in the manner prescribed by Section 318, Alabama School Code, 1927. An attendance officer so selected and appointed is not a mere clerical assistant, but is an officer, holding a civil office of profit under this State. By Sections 143-152, Code of Alabama, 1923, provision is made for the creation of county boards of child welfare, their powers, functions and duties are prescribed, and amongst these powers is the power to appoint a county superintendent of child welfare whose duties are also outlined. No provision is made by general statute for the appointment of a county superintendent of child welfare in other manner than that hereinabove set forth. As I understand it, there is no county board of child welfare in your county and hence you have no county superintendent of child welfare as defined in Section 150, Code of Alabama, 1923. Evidently, the County Board of Education of your county, in agreement with the court of county commissioners, has appointed an attendance officer for the whole county, whose duties are defined by statute, and by some arrangement of the county board of education, this attendance officer has imposed upon him or her, certain additional duties as a so-called child welfare worker, under some rule or regulation of the county board of education. This being true, I see no reason why the county board of education might not require these additional duties to be performed so long as not conflicting with the duties of attendance officer.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

Hon. R. E. Smith,
Room 101, Court House,
Birmingham, Alabama.

Birmingham Court of Common Pleas: Money held by the erst-while Clerk of the Court of Common Pleas which was paid into Court on judgments and as witness fees, upon the Act being declared unconstitutional which created the Court should be held by the person to whom the same was paid, and upon claim by person from whom same was collected, be paid back to such person.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of June 20, 1929.

You state that you have collected quite a bit of money as witness fees and costs. You state that you have this money in a bank.

You inquire what disposition should be made of the same.

This is to advise you that you should upon a proper claim made by persons who paid such moneys into court on judgments and costs return the same to such persons.

A Court which was unconstitutionally created was never created at all. Its judgments are void and incapable of enforcement. No rights may be gained thereunder and in my opinion any moneys paid under such void judgments either for costs or on money judgments may be recovered.

Norton vs. Shelby County, 118 U. S. 425,

Opinion Attorney General June 19, 1929, addressed to Treasurer of Jefferson County, Vol. 12, Opinions Attorney General (Office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Clerk of the Circuit Court,
Hamilton, Marion County, Alabama.

Bonds: Premiums on bonds of Circuit Clerk and Probate Judge not payable by county prior to adoption of Code of 1923.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of June 22, 1929, in which you state that County Officers in Marion County are under the fee system, and that it is your un-

derstanding that prior to 1923 such officers were not compelled to make bond with corporate surety.

You request my opinion:

Should the county pay the premiums on the bonds of the circuit clerk and probate judge during their terms extending from January, 1923, to January, 1929?

Answering your question, I am of the opinion that the county could not pay the premium of the circuit clerk and probate judge for any bond made prior to the adoption of the Code of 1923, which became effective August 16, 1924. Section 2658, Code of 1923, reads as follows:

"2658. Bonds of county officers made by surety or guarantee companies.—After the adoption of this Code the officers and authorities authorized to fix and approve or to require additional bonds as to all county officers shall require that the bond of such county officer be made by some surety or guarantee company or companies authorized by the laws of this state to make such bond; and the premiums of such bonds shall be a charge against the county and payable out of the county treasury upon the certificate of the officer or agency requiring, fixing or approving the bond."

The above quoted section was placed in the Code of 1923, by the Code Committee, and is an entirely new section. It does not appear in any of the preceding Codes.

The bonds of the circuit clerk and probate judge whose terms of office began in January, 1923, were made under the provisions of Sections 3269 and 5413, Code of 1907, neither of which sections required the county to pay the premiums on the bonds of such officers. The bonds of these officers were made prior to the adoption of the Code of 1923, therefore, the provisions of Section 2658 of the Code of 1923, were not in effect.

Section 2658, Code of 1923, makes it compulsory that the bond be approved "after the adoption" of the Code should be made by some surety company, and that the premium thereon shall be paid by the county. This necessarily refers to bonds for terms of office beginning after the adoption of the Code. County officers prior to the adoption of the Code of 1923 were permitted to make bond in some surety company, but they were required to pay the premiums on their bonds.

I am, therefore, of the opinion that the premiums on the bonds of the circuit clerk and the probate judge which were made prior to the adoption of the Code of 1923, could not be properly paid by the county.

Report Attorney General, 1926-1928, pp. 355, 42, 43.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

County Solicitor,
Florence, Lauderdale County, Alabama.

Fines—legality of fines not dependent upon the authority of the officer making arrest.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of June 22, 1929, in which you state you have numerous inquiries concerning the legality of fines which have been imposed against defendants who were arrested by men acting as law enforcement officers under what is known as a blue card commission.

You request my opinion:

Will fines and cost paid by parties arrested by such officers have to be returned to the defendants?

In reply to your inquiry will say, certainly not. The fine and cost was not imposed for being arrested, but for committing an offense. The question as to the authority of the officer making the arrest is not involved. This could have no effect upon the final judgment of the court.

I know of no way that money paid as fines and costs may be returned. Where there are cases now pending and the defendant is later convicted, the Clerk of the Court or the Justice of the Peace would not be authorized to pay such an officer any fee for making the arrest, as he is not even a de facto officer, nor is he acting under color of office, and this being the case he would not be entitled to any cost at his instance.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

License Inspectors—Power—(1) Make arrest; (2) To take bond;
(3) To commit to jail.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 23, 1929, in which you state:

"It is generally the custom of the License Inspector of the State to turn over to the Sheriff for service all papers in which service is neces-

sary in connection with the collection of licenses. Some of the License Inspectors of the State think the Sheriff delays the collection of licenses unnecessarily and wish to begin the plan of serving all their own warrants and citations."

You request my opinion:

1. When license inspector has sworn out a warrant for the collection of the license under the provisions of Section 72 of the Revenue Act of 1927, has the license inspector the authority to make arrests?

2. If the license inspector has such authority, when the arrest is made, has the license inspector the authority to take and approve bond?

3. If person arrested declines or is unable to make bond, does the law compel the sheriff to receive the person arrested at the county jail?

My answer to all three of your inquiries is in the affirmative.

Section 72 of an Act approved July 22, 1927, (General Acts 1927, p. 185) provides among other things, "* * * License Inspectors shall have the same power to arrest persons violating the revenue laws of the State as is now vested in the sheriffs of the State, and shall receive the same fees for such service. * * *"

It is my opinion that the above provision confers on license inspectors all the power and the authority which is now conferred on the sheriffs of the various counties in connection with the enforcement of all revenue laws.

See Opinion of the Attorney General rendered to the License Inspector of Hale County, Feb. 8, 1929 (Office Edition, Vol. 9 p. 151).

The license inspector being clothed with all the power and authority of a sheriff in enforcing the revenue laws, and under Section 3363, Code of Ala. 1923, the sheriff having the power to set and approve bonds in all misdemeanor cases, it naturally follows that if a license inspector arrests a person for violating the revenue laws of the State in the southern end of his county, that it would be absurd to require that he convey this person perhaps to the northern end of the county to have his bail fixed and approved by the sheriff.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The State Prison Inspector,
CAPITOL.

Feeding prisoners of city confined—County jail under contract with county.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 7, 1929.

You request my opinion:

1. Does the court of county commissioners have authority to enter into a contract with a town or city to feed city prisoners?
2. Has the sheriff of a county authority to enter into contract for the feeding of the prisoners of a city or town, who may be confined in a part of the jail, the said part of the jail having been contracted for by the city or town from the county governing authorities?

In answer to your first question I am of the opinion that the court of county commissioners or other governing body of the county is without authority to contract with a city or town for the feeding of municipal prisoners.

Opinions of Attorney General to State Prison Inspector of June 6, 1929, Book 12, (office edition).

In answer to your second question, I am of the opinion that the sheriff cannot enter into a contract with a municipality for the feeding of municipal prisoners.

Citation *supra*.

Under your first question, Section 2317 of the Code of Alabama, 1923, provides that a municipality may enter into a contract with the court of county commissioners or other governing body of a county for the use and occupation of a part of the jail for the confinement of municipal prisoners. That being so, can the court of county commissioners contract to feed municipal prisoners? I think not. There is no provision of law for expending the county's money for feeding municipal prisoners.

Under your second question, the sheriff by the provisions of Section 4826 of the Code of Alabama, 1923, shall feed the prisoners under his jurisdiction. Municipal prisoners not being under the jurisdiction of the sheriff it necessarily follows that the part of the jail allotted to the municipality by the contract becomes the municipal jail, and the municipality must feed its own prisoners.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Tax Collector,
Seale, Russell County, Alabama.

Bonds: Tax Collector liable on failure to require bond from bank which is a State and County Depository.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of June 22, 1929, in which you state that the Phenix-Girard Bank, Phenix City, Alabama, is the county depository, and as such county depository is under bond to the county, and that said bank is also a state depository.

You request my opinion:

Would the bond of the Phenix-Girard Bank to Russell County made to secure the funds in the bank to the credit of Russell County, and the bond as a state depository protect my deposits as tax collector?

The answer to your question is in the negative. The fact that the Phenix-Girard Bank has given bond both as state and county depositories would not protect you when depositing funds with said bank to your credit as tax collector of Russell County. So long as the account is kept in your name as Tax Collector of Russell County, you would not be protected from civil liability in the event the bank should fail. Your attention is specially directed to Section 3973, Code of Alabama, 1923, which reads as follows:

"3973. Embezzlement by public officers.—Any probate judge, clerk of a court of record, register of the circuit court, sheriff, coroner, tax collector, county treasurer, trustee of public schools, notary public, justice of the peace, constable, or other public officer who knowingly converts to his own use, or permits another to use any of the revenue of the state, or of any county thereof, or any money paid into his office, or received by him in his official capacity, is liable to indictment, and, on conviction, must be punished as if he had stolen it; but none of the officers herein named shall be criminally liable under the provisions herein contained for depositing the revenue of the state or county, or any money paid into his office or received by him in his official capacity, in a bank if the officer making the deposit in good faith requires, and takes from the bank, at or before making the deposit, good and sufficient security to secure the payment of the funds deposited."

You will note that under the provisions of the above quoted section certain county officers are criminally liable for depositing money in a bank without requiring good and sufficient security.

In order to fully protect you from liability, it would be necessary for you to require of this bank good and sufficient security to secure the payment of any public funds deposited by you in your name as Tax Collector.

National Surety Co. v. State of Alabama, et al, (in mms.),
Jerald v. Walker, 201 Ala. 502, 505,
Moody v. Jacob, 211 Ala. 291.
Lacy v. State, 13 Ala. App. 212,
Ex parte Lacy, 193, 677.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The County Treasurer,
Geneva, Geneva County, Alabama.

Gasoline Tax—County's proceeds from gasoline tax levied by State must be used for current maintenance and upkeep of roads and bridges.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This acknowledges the receipt of your request for an opinion transmitted to this office by letter from the Hon. W. O. Mulkey of date June 20, 1929.

You state that Geneva County issued **deferred** interest bearing warrants against the gasoline tax funds of the county. At the time such warrants were issued the county was in excess of its constitutional and statutory debt limit. I assume for the purposes of this inquiry that the county had also levied the authorized tax for the payment of debts incurred in the maintenance of the public roads of the county.

Section 215 and 224, Constitution, 1901.

You inquire whether or not as treasurer you should pay such warrants upon maturity, which were drawn against the gasoline fund.

I am of the opinion that any warrant drawn against an anticipated gasoline fund of the county is void.

It was the intention of the Legislature that debts against this fund should not be created. Such is the opinion of this office as written by the Hon. A. A. Evans of date May 29, 1929, Vol. 11, p. 236, (Office Edition) Opinions of Attorney General. I enclose herewith a copy of same.

I do not undertake to advise you whether or not the debt is void, not having been informed whether or not your county has levied and pledged its authorized additional amount for the payment of indebtedness incurred in maintaining its roads.

However, generally speaking, debts incurred after the constitutional debt limit has been reached and in defiance of the Constitution, are void.

Sections 215 and 224, Constitution, 1901.
Hagan v. Limestone County, 160 Ala. 544.
Brown v. Gay-Padgett Hdw. Co., 188 Ala. 423, 427.
Potts v. Conecuh Co., 203 Ala. 300.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 8, 1929.

The Tax Collector,
Anniston, Calhoun County, Alabama.

Tax Assessor: Should assess for taxes properly exempted under Code Section 3023;

Tax Collector: Collects State tax, and county and district school tax.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of October 1, 1928, in which you state that in Calhoun County a number of exemptions under Section 3023, Code of Alabama, 1923, have been granted by the Board of Revenue, and the custom has been for the assessor to continue to assess the property both for State and County taxes, notwithstanding the granting of the exemptions, and for the tax collector simply to collect the State tax, but not collect the County tax.

You request my opinion:

Is this the proper procedure or should the tax assessor omit from the assessment roll any assessments for county purposes against the exempted property?

Section 3023, Code of Alabama, 1923, reads in part as follows:

"* * * the court of county commissioners, or other court having like jurisdiction, of any county, or the constituted authorities of any city or town in which it is proposed to locate or add to or extend any such factories or plants, are authorized and empowered to remit the taxes assessed on such factories and shipbuilding plants and on all extensions or additions to any such factories or shipbuilding plants as are already built and operated, and on all buildings, works, machinery and other equipment of such factories or plants or additions thereto or extensions thereof, and on the lands on which such buildings, plants and factories or additions to or extensions thereof are located, and also on all the capital stock of such factories and shipbuilding plants or increase of such capital stock made for the purpose of making additions thereto or extensions thereof, for all county or municipal purposes for a period not exceeding five years from the date of the incorporation or organization of

such factory or shipbuilding plant, or from the date of the completion of any such additions to or extension thereof."

Where the court of county commissioners has exercised the authority granted it under the terms of the above quoted section, the tax assessor should nevertheless assess the property upon which the taxes have been remitted, and the tax collector should proceed to collect all State taxes, and all county district school taxes, but he is not required to collect any other county taxes.

You will note that Section 3023 of the Code, *supra*, does not use the word "exempt," but states that the court of county commissioners is authorized and empowered to "remit" the taxes on such factories and shipbuilding plants, etc. This section does not authorize the court of county commissioners to remit the county and district school taxes, but only covers the remitting of other county and city taxes. Therefore, the tax collector should collect the county and district school taxes as heretofore stated.

It has been the consistent ruling of this office that Section 3023 of the Code does not, and cannot apply to the county three mill school tax or to the district three mill school tax, and that such taxes are levied upon the taxable property in the county or district in the manner prescribed by the Constitution, and must be used as prescribed by the Constitution, and that all other county and city taxes may be remitted under said Act.

Report of Attorney General, 1926-28, pp. 101, 368, 507.

While this office held in an opinion rendered the Tax Assessor of Madison County on December 7, 1926, that Section 3023, Code of 1923, was without any force and effect, the Legislature of 1927, validated and made effective all exemptions from taxation granted by any county or municipality since the 17th day of August, 1924, under the apparent authority of Sections 3023, 3024 and 3025, Code of Alabama, 1923.

It is well to state here that counties and municipalities who have heretofore been remitting taxes under Sections 3023, 3024, and 3025, *supra*, should hereafter proceed under an Act approved February 18, 1927. This Act copies verbatim the above quoted Section.

Acts 1927, p. 56.

Report of Attorney General 1926-28, pp. 55, 74.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 9, 1929.

The Clerk of the Circuit Court,
Monroeville, Monroe County, Alabama.

Costs—county convicts—clerk entitled to only such costs as provided by Section 3667.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge the receipt of your letter of some time ago. The matter about which you inquire has been in litigation for several months. The decision of the Court of Appeals was not determinative of the question you present.

You state that your Court of County Commissioners has contracted with the State Board of Administration for the use of its convicts who have been sentenced to hard labor for the County. You also state that in the instant case the State Board of Administration paid to you the sum of \$43.60 as the costs in the case, this amount having been paid as per schedule of fees in Section 5667 of the Code of Alabama, 1923. You also state that the defendant was sentenced to hard labor to work out the costs adjudged against him by the trial court. These costs amounted to \$63.10. Subsequent to your receipt from the Board of Administration of the costs, viz., \$43.60, provided in Section 3667 of the Code of Alabama, 1923, you have accepted from the convict the full amount of the costs, viz., \$63.10.

You inquire as to whether or not you should return or forward to the Board of Administration the full amount collected by you from the convict.

The costs collected by you from the convict belong in toto to the State.

Your Court of County Commissioners has entered into a contract with the State Board of Administration, in pursuance of Section 3 of an Act approved February 18, 1927, (General Acts, 1927, p. 52) in which it was agreed that the county officers receive only the fees provided in Section 3667 of the Code of 1923, which are the fees provided in State cases or felony cases.

The Court of County Commissioners, as authorized by the Act of 1927 above referred to, agreed that if the State would work its convicts that it should be entitled to all the costs adjudged against the convict, and that the State should recompense the officers only, partially for their costs and fees, that is, as the officers are entitled in felony cases.

Section 3 of an Act approved February 18, 1927, (General Acts, 1927, p. 52) provided upon receipt of a county convict the officers should be paid only such fees as allowed by Section 3667.

The Board of Administration must account to the county for its use of county convicts, and must pay to the county the net earnings of the convict—**provided there are any.**

Section 6, Act approved Feb. 18, 1927, (General Acts, 1927, p. 52).

The Board of Administration is authorized to charge as an expense of maintenance of the convict the costs paid to the officers under the schedule provided in Section 3667. This is indicative of the intention of the Legislature that the State should not pay to the county officers the full amount of the costs adjudged against the defendant and for which he was sentenced.

The Legislature gave to the Court of County Commissioners of each County the right or option of entering into such contract, and where the option was exercised your items of costs, to be derived from the convicts labor, were appreciably diminished. This was done by the governing body of the County, which under the Act of 1927, was authorized.

When you accept costs from a convict who has been turned over to the State, you accept such costs for the use and benefit of the State Board of Administration.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 11, 1929.

The Judge of Probate,
Selma, Dallas County, Alabama.

Where lease of real estate is made for a period of years payable at a certain amount annually, the proper basis for estimating the filing tax is the present cash value of all the payment when added together.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of January 19th addressed to Judge Chas. E. McCall, Chief Examiner of Accounts, has been referred by him to me for reply. You wish to know the amount of filing tax due for recording lease made to S. H. Kress & Co., of a storehouse on Broad Street, Selma, Alabama, for a period of twenty years, payable \$3,600.00 per year for the first ten years, and \$4,200.00 per year for the second ten years.

Also, on a lease to S. H. Kress & Co., for a storehouse in Selma for thirty years payable \$3,600.00 per year for the first ten years, and \$3,900.00 per year for the second ten years, and \$4,200.00 per year for the third ten years.

In reply will say that, in my opinion, the filing tax should be based upon the present cash value of the payments.

I would suggest that to find the present cash value of each of such payments the table of value as shown in the case of Reiter-Conally Mfg. Co. v. Hamlin, as Administrator, 144 Ala. p. 220, can be used. This I think will give you a fair result.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 15, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Loans obtained by County School Boards, under the provisions of Section 130 of School Code, 1927, to meet salaries of teachers and current expenses, except such as are based upon pledge of county three mill tax and district three mill tax, levied by virtue of the Third Amendment to the Constitution of the State, are payable only out of the funds accruing for the support of the schools within such school year and are payable only within such school year.

Three mill county school taxes and three mill district school taxes, other than such as have already been levied by vote of the people, cannot be pledged to secure such a loan.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of July 5th is acknowledged. You make the following statement of facts:

On March 27th, 1929, a note was made to the First National Bank, Stevenson, Alabama, for \$6,500.00, payable December 1st, 1929, which purports, on its face to have been "For money advanced to pay teachers' salaries and other current expenses for the year ending September 30th, 1929. Amount actually received by School Board, \$6,140.30.

This note was signed: G. H. Caperton, President Jackson County Board of Education; J. H. Wheeler, Secretary Jackson County Board of Education.

On June 12th, 1929, a note was made to Hamilton National Bank, Chattanooga, Tenn., for \$13,400.00, payable December 5, 1929, signed: G. H. Caperton, President of Jackson County Board of Education, Scottsboro, Ala. Attest: J. H. Wheeler, Secretary Jackson County Board of Education.

Amount actually received by School Board, \$12,878.00.

On March 29, 1929, a resolution was passed by the Jackson County Board of Education authorizing the borrowing, under the provisions of Section 130 of School Code, 1927, of the sum of \$40,000.00 and pledging for the payment of said loan, or loans, the taxes derived from Jackson County four mill tax beginning on the first day of October, 1929.

This resolution authorized G. H. Caperton, President of said Board, to borrow the money on the credit of the school funds of Jackson County, in the name of and for the use of said County Board of Education, in a sum not to exceed \$40,000.00 and to execute a note in the name of said County Board of Education.

On April 9th, 1929, said G. H. Caperton executed two notes to the First National Bank of Chattanooga, Tennessee—one for \$10,000.00, payable

November 20, 1929, with interest at the rate of eight per cent per annum; one for \$15,000.00, payable December 6, 1929, with interest at the rate of eight per cent per annum. For the payment of each of these notes there was pledged the four mill tax in accordance with said resolutions.

On April 24, 1929, a note was made to J. C. Jacobs Banking Co., Scottsboro, Alabama, for \$7,000.00, payable January 3rd, 1930, and four mill tax as provided by said resolution was pledged for payment. This note recites on its face: Money loaned to make pay roll, and was signed: G. H. Caperton, President County B., J. H. Wheeler, Supt.

The amount received by the County Board of Education on this note was \$6,612.65.

By the Jackson County four mill tax, I presume, was meant the three mill County School tax authorized by the Third Amendment to the Constitution of the State of Alabama, together with the one mill tax authorized by Section 269 of the Constitution of the State of Alabama.

You wish my opinion as to the legal status of each of said notes.

In reply to your inquiry will say that, in my opinion, all the loans authorized by Section 130 of the School Code, 1927, except such as are based on the county three mill tax or the district three mill tax, are payable out of the funds accruing for the support of schools within such given school year and none other. The funds accruing for the support of schools a subsequent year, other than from such three mill county school tax and three mill district school tax, cannot be legally used to pay debts accrued during the former school year. The school year begins on the first day of July and ends on the thirtieth day of the following June. School Code, 1927, Section 319.

The school year in which the loans, represented by the notes in question, were made, began July 1, 1928, and ended June 30, 1929. These loans cannot be legally paid out of any school funds accruing for the support of schools for the year beginning July 1st, 1929, except those funds that shall accrue from the collection of the three mill county school tax, and these could not be pledged for a longer time than the then current levy of such taxes ran.

The one mill tax authorized by Section 269 of the Constitution, can, in my opinion, be used only in the school year in which it accrues, and then only for the purpose authorized by the Constitution. The attempt to pledge this one mill tax accruing in a subsequent school year, is a mere nullity.

Of course, the district three mill tax cannot be used or pledged for general county school purposes. The amendment to the Constitution provides:

"The funds arising from the special school tax levied in any district which votes the same independently of the county shall be expended for the exclusive benefit of the district, as the law may direct."

There does not appear to have been any district tax pledged as security for any of the loans evidenced by said notes.

There was, in my opinion, no authority of law for contracting to pay a greater rate of interest than eight per cent per annum upon the amount of money actually received for use by the County School Board. The discounting of notes at the rate of eight per cent per annum was not legal.

The two notes of April 9th, 1929, made to the First National Bank of Chattanooga, Tenn., appear to be in accordance with the law and the resolution of the County Board of Trustees. These notes amounting to \$25,000.00 and interest till due, are, in my opinion, a first lien upon the county three mill tax due October 1, 1929.

The note of April 24th, 1929, for \$7,000.00 is a second lien upon the county three mill tax, due October 1st, 1929, and payable out of the proceeds of such tax if such proceeds shall prove sufficient.

The note of March 27th, 1929, for \$6,500.00, should have been made payable on or before June 30th, 1929. There is no authority of law for making it payable at a later date, nor for paying it out of any money other than school revenue accruing for the school year beginning July 1st, 1928, and ending June 30th, 1929. Such a loan, under the provisions of Section 130 of the School Code, 1927, "shall be paid within the school year in which such current loans are made, and from the funds accruing for the support of the schools within such given year." The same is true of the note for \$13,400.00 of date June 12th, 1929.

Except the loans, which, by contract, are made liens upon the county three mill tax, or, in proper case, against the three mill district school tax, all loans obtained under the provisions of said Section 130, must be made payable by or before June 30th of the current school year and be paid "from the funds accruing for the support of the schools within such given school year."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 15, 1929.

The Judge of Probate,
Wedowee, Randolph County, Alabama.

Workmen's Compensation—counties are not employers within the terms of the Act.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 24, 1929, in which you request the opinion of the Attorney General on the following question of law:

Can the Workmen's Compensation law be made applicable to the employees of county?

I am of the opinion that there is no law which requires or permits the county to take out employer's liability insurance for the protection of its employees.

Aside from the doubtful validity of such a law, the Workmen's Compensation Acts, (General Acts 1919, p. 206) indicates clearly that the State, nor any political subdivision thereof was intended to be included with in the meaning of the term "employed" as used in this Act. Section 8 of this Act provides in part as follows:

"This Act shall not be construed or held to apply to any common carrier (doing an interstate business) while engaged in interstate commerce, or to domestic servants, farm laborers, or to any county, city, town, village or school district."

Section 30 permits every employer who accepts the provision of the Act to take out employers' liability insurance.

Section 36 (a) defines "employer":

"The term 'employer' as used herein shall mean every person not excluded by Section 8 who employs another person to perform a service for hire, and to whom the employer directly pays wages, and shall include any person or corporation, company, co-partnership or association or group thereof, etc."

It is clearly the purpose of this law to afford a simple and adequate remedy for the collection of compensation for injuries received by them while engaged in their work. As to employer, it substitutes one liability for another. As the State cannot be sued without its consent and as no liability has ever existed against the State or County on account of any injuries suffered by its employees, I am sure the State and County are not employers within the meaning of the Act.

See Constitution, 1901, Section 11.

Comer v. Bankhead, 70 Ala. 492.

White v. Alabama Insane Hospital, 130 Ala. 479.

Attorney General's Report, 1920-22, p. 61.

Attorney General's Report, 1926-28, p. 641.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 16, 1929.

The Clerk of the Circuit Court,
Heflin, Cleburne County, Alabama.

Appeals—From county court in criminal cases.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 5, 1929, in which you request my opinion:

Where a person is convicted for an offense by the county court, and who fails to execute an appeal bond or give notice of an appeal to the Circuit Court, can he subsequently appeal to the Circuit Court after having failed to give such notice or execute bond?

In answer to your question, I am of the opinion that in all cases of conviction in the county court where the defendant desires to appeal to the Circuit Court, he must either enter into bond with sufficient surety to appear at the term of court to which the appeal is taken, and from term to term until discharged, or if he cannot make such bond, notice must be given at the time of the rendition of the judgment, and the appeal must be noted by the judge of the county court.

Code of Alabama, 1923, Section 3857,
Ex parte Harper, 112 So. p. 96.
Baader v. State, 201 Ala. 76.

You will note the statutory requirements for an appeal by a person from the county court to the Circuit Court, it being purely statutory the statute must be complied with. It, therefore, follows that if the defendant did not, at the time of the judgment and sentence by the county court, make known to the court that he desired to appeal to the Circuit Court, he has failed to comply with a statute.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 17, 1929.

The Register in Chancery,
Florence, Lauderdale County, Alabama.

Taxes—State and County have prior liens over cities for taxes.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of June 30, 1929, in which you state as follows:

"In the list of delinquent tax list filed by the City of Florence in this office for the collection of city taxes, appears some property that was assessed by the owner during assessment time in the latter part of

1927. In May, 1928, the said property was sold to the State of Alabama for the use of the State Normal College of this city. The parties owning and assessing this property in the year 1927 contends that the property is not subject to sale for the city taxes because of the fact it is now owned by the State."

Upon the above statement of facts you request the opinion of the Attorney General on the following question of law:

Is said property subject to sale for city taxes if it was assessed one or more years before being bought by the State, and the taxes not paid under said assessment.

I am of the opinion that there is no statute which indicates an intention to deprive the city of the taxes due it under the Constitution and laws of the State. The State and County have a prior lien for their taxes, but this simply postpones and does not destroy the lien. The said property may be sold for city taxes, notwithstanding it has been bought in by the State, if the city taxes were due before the State bought in said property. But in all events the State and County have a prior and superior lien over the city for taxes.

Attorney General's Report, 1924-26, p. 68.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 17, 1929.

State Highway Director,
CAPITOL.

Highways—Contracts for the construction thereof—not abrogated or changed except upon an agreement or a violation of their terms.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of recent date in which you state that on December 20, 1928, the State Highway Department entered into a contract with one W. F. Flowers, for the construction of Federal Aid Project 202-B and Federal Aid Project 5 Mobile County for the construction of 7.82 miles of grading and draining. You further state that the contract was let with the understanding that no work was to be done until all rights of way had been secured by Mobile County, and you further state that rights of way have been secured and the contractor has wired "he is ready to start construction of the roads." It is further stated by you that the contractor has been adjudicated a bankrupt on projects in Washington and Choctaw Counties where he was acting as a subcontractor for the Bessemer Engineering and Construction Company.

You request my opinion:

It is our duty to allow the contractor to proceed with the construction of the road; or annul the contract and call on the bondsmen, the

Union Indemnity Company, to complete the road or readvertise and call for new bids?

In answer to your question I am of the opinion that you cannot annul the contract or call upon the Surety Company to complete the project, neither can you readvertise this project and call for other bids until there has first been an agreement between the commission and W. F. Flowers, to rescind the contract or a violation of the terms thereof.

Union Indemnity Co. vs. State, for the use of McQueen Smith Farming Co., 114 So. p. 415.

Barrington vs. Barrington, 200 Ala. 325.

It is the law that where the agreement is complete by acceptance, a new proposal to modify or annul it, has no effect on the agreement unless it is complete and thus becomes a new substituted agreement. Hite vs. Savannah Electric Co., 164 Fed. 944, Lenn vs. McLean, 80 Ala. 360.

The fact that the contractor has been adjudicated a bankrupt does not affect the validity of the contract if valid when made, neither can the State Highway Department relieve the contractor unless he agrees to a rescision of the contract, because a contract is an agreement between two or more parties resulting in an obligation of legal tie, by reason of which one party is entitled to have certain stipulated acts performed or forborne by the other. From the contract and facts submitted by you, it is apparent that there has been no violation of its terms, and that the contractor is ready and willing to perform, there is little doubt.

I am not unmindful of the holding by the Supreme Court in the case of Union Indemnity Company vs. State wherein Mr. Justice Bouldin speaking for the court said, " * * * The State Highway Department, consisting of the State Highway Commission, is charged with the general, duty to designate, construct, standardize, repair, and maintain roads and bridges in this State. The State Highway Commission determines all questions relating to the 'general policy' of the Highway Department, the conduct of its work, and performance of its duty; has 'general supervision' over construction and maintenance of all public roads and bridges where state funds are used; has power to adopt all reasonable and necessary rules and regulations for the construction of roads and bridges."

It is manifestly clear that it is the duty of the Highway Commission when bids are received and before contracts are entered into to ascertain whether or not the contractor has sufficient means financially to carry out the terms of the contract, and if such contractor or bidder is unable in the judgment of the State Highway Commission to carry out the terms of such contract, it then becomes the duty of the Highway Commission to let the contract to one who is able to carry out the terms thereof for the construction of such project. The terms of the statute are written in both the contract and bond, and if for any reason the contractor should fail to carry out the terms of his contract then the surety is bound to perform. That being so, how can the State Highway Commission annul the contract until there is a

breach of conditions? I know of no law that would authorize the State Highway Commission to annul and make void a contract that was valid when made, and one which is admitted that there has been no breach of its terms.

In *Barrington vs. Barrington*, supra, it is said, " * * * The Legislature can say what the law thereafter shall be, but not what it was theretofore; what it shall be to-morrow, but not what it was yesterday; that is not within its province or function. If an act is done today according to law the legislature cannot say to-morrow that the act was unlawful. If a contract is made today according to law, and is therefore valid, the Legislature will have no power to-morrow to say that it was not made according to law, and is therefore void and annul it. It can say that a contract made hereafter, as a former one was made, shall be void, but it cannot make void a contract heretofore made and executed, if valid when made, nor make valid a contract executed in the past, if it was void when made."

If the Legislature cannot make void and annul a contract which was valid when made, it necessarily follows that the State Highway Commission, notwithstanding the fact that it is clothed with plenary powers in the construction and maintenance of a system of highways, cannot annul the contract neither can it release the sureties on the bond.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 23, 1929.

The Judge of Probate,
Wetumpka, Elmore County, Alabama.

Salary of Judge of Probate—Construction of Act approved September 6, 1927, (Local Acts of 1927, p. 377).

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 12, 1929.

You request my opinion:

Advise if under Local Act approved September 6, 1927, (Local Acts 1927, p. 377) fixing the salary of the members of the Commissioners' Court of Elmore County at \$5.00 per day, whether or not the Judge of Probate is entitled to said sum per day for his services while attending Commissioners' Court?

In answer to your question I am of the opinion that the Judge of Probate would not be entitled to the \$5.00 per day plus mileage, under the Act approved September 6, 1927, (Local Acts 1927, p. 377).

From each of the four districts of your county a member of the Court of County Commissioners is elected, and the Act, supra, provides that each of

the members of the Court of County Commissioners shall be paid the sum of \$5.00 while occupied in the discharge of their duties as such members of the Court of County Commissioners, and seven cents per mile in going and returning from their respective court or sessions of same. Had the Legislature intended that the Judge of Probate should have received the same sum, it would have, therefore, included him in the Act.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 23, 1929.

Mr. W. H. Hurt,
Clerk, County Board of Revenue,
Tuskegee, Macon County, Alabama.

Counties are not required to pay gasoline tax levied under Act No. 5, approved January 25, 1927 (Acts 1927, p. 16) nor tax levied under Act No. 62, approved February 10, 1923 (Acts 1923, p. 36) as amended by Act No. 340, approved August 27, 1927 (Acts 1927, p. 326).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of March 26, 1929, is acknowledged. You make the following statement of facts:

Macon County is buying gasoline to be used for propelling County owned and used tractors and trucks from wholesalers and paying State, County and City taxes on the sale thereof.

You wish my opinion as to whether or not the County is exempt from paying these different taxes on gasoline used for road purposes.

In reply will say that a County has no authority of law, so far as I am aware, to be a retail dealer or distributor of gasoline. So your County could not have paid the gasoline tax on the sale by it of gasoline, as it had no legal authority to be a retail dealer in gasoline. Neither has it any authority to be a distributor of gasoline. Is it a storer of gasoline within the meaning of the Act?

If you have been paying taxes to the state as storer of gasoline, on withdrawal for the use specified, then, in my opinion, you have improperly used the funds of the County in doing so. There is no one to whom you can pay the gasoline tax provided for by Act No. 5, approved January 25, 1927 (Acts 1927, p. 16) or the gasoline tax provided for by Act No. 62, approved February 10, 1923 (Acts 1923, p. 36), as amended by Act No. 340, approved August 27, 1927 (Acts 1927, p. 326), except the State. Hence, if your County has not paid the State a gasoline tax as storer, it has not paid a gasoline tax.

It is my opinion that it was not the legislative intent in either of said Acts, to tax counties or municipal corporations as storers of gasoline, when

stored by either and afterwards withdrawn for the purpose of performing a governmental function enjoined upon it by law. The construction, maintenance and improvement of public roads, bridges and ferries in the County by the Court of County Commissioners or Board of Revenue is a governmental function imposed by statute.

Section 1347, Code of Alabama, 1923.

Section 1 of said Act No. 5 (Acts 1927, p. 17) provides in part, as follows:

"The word person means and includes persons, corporations, co-partnerships, companies, agencies or associations, singular or plural. The term distributor shall include any person who engages in the selling of gasoline in this State by wholesale domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term retail dealer shall include a person herein defined as distributor who is also engaged in the selling of gasoline in this State, at any place in this State, in broken quantities. The term storer as herein used shall include any person who ships gasoline into this State in tank quantities and stores the same and withdraws or uses the same for any purpose."

It is my opinion that there was no legislative intent of levying the gasoline tax upon act of counties or municipalities with reference to gasoline. In my opinion, a county or a municipality is not a "person" within the meaning and intent of said Acts. Where the Act says "the word person means and includes persons, corporations, co-partnerships, companies, agencies or associations," it evidently refers to private corporations, and not to a subdivision of the State government. The very category in which the word "corporation" is placed—persons, corporations, co-partnerships, companies, agencies or associations, singular or plural"—shows this.

When a County buys gasoline in this State from a "retail dealer" or "distributor," the retail dealer or distributor must pay the tax. Purchasers from retail dealers or distributors never are required to pay the tax. In such case, the seller and not the buyer pays the tax. He may sell his gasoline at any price he sees fit. The State is not interested in that. The tax can be paid to the State only.

If Macon County is a storer of gasoline within the meaning of said Acts, then, in my opinion, the County does not have to pay a tax on the withdrawal of gasoline for the performance of a government function imposed by law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 23, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Court of County Commissioners: Not authorized to pay individual for services required to be performed by Probate Judge or County Depository.

Probate Judge: Liable on official bond for illegal warrant on depository.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of July 1, 1929, in which you enclose a letter from W. L. Lee, Jr., Examiner of Accounts, who is making an investigation of the county affairs of Bibb County.

You request my opinion:

1. Where the county has designated the Bibb County Banking and Trust Company as County Depository, has the County any authority to pay an individual \$30.00 per month to keep the treasurer's receipt and disbursement book and register of claims?
2. If this is not a legal payment by the county, is the Probate Judge liable on his official bond for this illegal warrant on the depository?

Answering your first question, there is no authority of law for the county to pay an individual any amount to keep the treasurer's receipt and disbursement book and register of claims.

Section 316, Code of Alabama, 1923, expressly provides that any bank or banks designated as depositories for county funds shall be charged with all the duties and subject to the same liabilities insofar as the safekeeping and paying out of the funds of the several counties are concerned, as are now imposed by law upon county treasurers.

Section 320, Code of Alabama, 1923, reads as follows:

"320. Compensation of county depositories.—The banks or bank acting as county depositories shall not receive any compensation or commission or other allowance for services as county depositories. In all counties under fifty-five thousand population where the county treasurer is now required by law to collect and receipt for road taxes and is charged with other duties as to such road taxes in such county, the judge of probate in such county shall be charged with the duty of collecting and receipting for such road tax, and of performing such other duties in connection therewith as are now required by law of county treasurers."

It will be observed from the foregoing that county depositories are charged with all the duties and subject to the same liabilities as county treasurers in certain instances, and that the judges of probate in counties un-

der fifty-five thousand population are charged with the duty of collecting and receipting for road taxes, and for performing such other duties in connection therewith as are now required by law of county treasurers.

There is no provision of law for the payment of any fee or salary either to the judge of probate or to county depositories, and I am, therefore, of the opinion and so advise you, that it would be unlawful to pay any salary or fee to an individual for the performance of any duties required of the probate judge or county depository.

The answer to your second question is in the affirmative and is expressly covered by Section 321, Code of Alabama, 1923, which reads as follows:

"321. Warrants, how drawn.—All warrants drawn upon the depository must be signed by the probate judge of said county or the president of the board of revenue or court of county commissioners of the different counties at the election of such board of revenue or court of County commissioners, expressed in a resolution which must be spread upon the minutes and given to such depositories that may be selected. Such officer signing such warrants shall be liable for the amount of any warrant drawn and paid by such depositories without the authority of law."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 22, 1929.

The State Health Officer,
State Capitol,
Montgomery, Alabama.

Construction of Section 1195, Code of Alabama, 1923.

Nurses' certificates—what hospital or society may issue same.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of July 8, 1929. You state that a certain hospital is owned and operated jointly by a county and two municipalities. Said hospital is not incorporated. The authorities of said hospital are desirous of meeting the requirements of Section 1195, Code of Alabama, 1923, in order that the graduate nurses of said hospital may be properly certified. You request my opinion:

1. Does such a hospital as described above meet the legal requirements of Section 1195, Code of Alabama, 1923, which are prerequisites of the certification of nurses trained therein?

2. If such hospital does not meet the requirements of said Section 1195 of the Code, with particular reference to incorporated institutions,

would the separate incorporation of the training school which is maintained for nurses in and by said hospital, in the absence of an incorporation of the hospital itself, meet the situation?

In answer to your first question, it is my opinion that such a hospital does not meet the requirements of Section 1195, Code of Alabama, 1923.

In answer to your second question, it is my opinion that the separate incorporation of the training school for nurses would meet the requirements of said Section of the Code. The Section here considered reads as follows:

"Any incorporated educational institution or society engaged in teaching and training its pupils in the science and art of nursing the sick, and which shall give hospital practice and training at a hospital maintaining not less than twenty beds and shall have such course of instruction and study as may be approved by the state health officer, may, upon obtaining and filing the certificate of approval of said state health officer, and recording the same as provided in the succeeding section, issued to the students pursuing said course of instruction and hospital training, certificates of proficiency or diplomas, and may confer the degree of graduate nurse."

The incorporation contemplated in the above quoted section has reference to that part of a hospital or that undertaking thereof which had as its objective the training of pupils in the art of nursing the sick. Therefore, the separate incorporation of the training school fully complies with the letter and spirit of the above quoted section. Nurses graduating from such a course maintained by such a training school would be legally entitled to a certificate which confers the degree of graduate nurse, provided that the other prerequisites named in Section 1195 and statutes pertaining to the subject of graduate nurses are strictly followed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 2, 1929.

The Sheriff,
Florence, Lauderdale County, Alabama.

Sheriffs—fees.

Code of 1923, Sections 3741, 7287—construction of.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 25th, 1929.

You request my opinion:

1. Under Section 3741, Code of Alabama, 1923, what fee is the Sheriff entitled to for serving subpoena or notice?

2. Under Section 7287, Code of Alabama, 1923, in civil cases what fee is the Sheriff entitled to and how are such fees to be taxed and collected?

In answer to your first question you are entitled for serving each subpoena or notice the sum of fifty cents under Section 3741, Code of Alabama, 1923, to be taxed and collected as other costs.

Burgin vs. Hawkins, Treasurer, 101 Ala. 326.

Biennial Report of Attorney General, 1926-28, pp. 267, 274, 474, 556.

In answer to your second question the Sheriff is entitled to the sum of sixty-five cents to be taxed and collected as other costs for summoning each witness and returning subpoena.

Code of Alabama, 1923, Section 7287.

Burgin vs. Hawkins, Treasurer, 101 Ala. 326.

The fees provided under Section 3741, supra, are for the Sheriff's services and allowance in criminal cases and differs from the fees provided for by Section 7287 of the Code. That Section provides for fees in civil cases.

In Bradley vs. State, 69 Ala. 323, it is said:

"If the defendant is convicted, the compensation claimed by his witnesses, and certified by the clerk, becomes part of the costs in which he is amerced by the general judgment for costs. It is taxed as costs and collected by the sheriff for the use of the witness * * * it is only the costs incurred by the state, or, to which the state, if it were liable for costs, could be subjected, for the payment of which a convict may be compelled to labor. It does not include costs incurred by the defendant in making defense, whether the compensation of witnesses, or the fees of officers of the court for services rendered to him."

The services rendered by the sheriff in summoning witnesses for a defendant who has been convicted, and was insolvent are services rendered for the defendant and must be paid by him.—Cohen vs. Coleman, 71 Ala. 496.

In Bower vs. State, 98 Ala. 83, it was said:

"The court cost for which a person convicted may be sentenced for hard labor, has been judicially declared. It includes all costs, including officers fees, incurred in behalf of the state. It does not include fees due witnesses summoned on behalf of defendant or costs incurred by him in making his defense."

Under Section 7287, Code of Alabama, 1923, the fee of sixty-five cents provided for summoning each witness and returning subpoenas are fees provided for in civil suits and such fees are to be taxed as costs by the clerk and collected by the Sheriff on execution.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 2, 1929.

The Judge of Probate.

Wetumpka, Elmore County, Alabama.

Toll bridges—rental by two or more counties—payment therefor.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 24, 1929, in which it is stated that several years ago the counties of Elmore and Tallapoosa agreed to make the bridge across the Tallapoosa River at Tallassee a free bridge by paying the owners of the bridge a rent semi-annually. You further state that at that time the roads leading to the bridge were county roads, and that at the present they are State roads and are being maintained by the State Highway Department.

You request my opinion:

Advise me if the counties can legally continue to pay this rent on the bridge in view of the fact that the roads leading thereto are State roads now, and being maintained by the State.

In answer to your question, I am of the opinion that the counties can legally pay the rent on the bridge to the owners thereof pursuant to the contract heretofore made and entered into between the counties jointly and the bridge company.

Code of Alabama, 1923, Chapter 266, Section 642 et seq.

Pickens County v. Greene County, 171 Ala. 377.

Barrington v. Barrington, 200 Ala. 315.

The cited chapter of the Code makes ample provision for the joint building or maintaining of bridges and ferries by counties, and it was said in *Pickens County v. Greene County*, supra, these sections of the Code are to be construed in *pari materia*, and in the light of the scheme for local government through county organizations it seems to be entirely clear that this chapter of the Code hereinbefore cited contemplates the concurrence of the judgments of the commissioners' court of the two counties interested, and that neither can act independently of the other. The fact that the roads leading to the bridge in question are State roads, and being maintained by the State Highway Commission, would not invalidate the rental contract heretofore made by Elmore and Tallapoosa Counties, and said Counties can continue to rent the bridge in my judgment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 2, 1929.

The Sheriff,
Anniston, Calhoun County, Alabama.

Sheriff jurisdiction over Camp McClellan, or other Federal Reservations.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of July 11, 1929.

You request my opinion:

1. Has the sheriff of Calhoun County, jurisdiction over crimes the situs of which is Camp McClellan?
2. What is the extent of the jurisdiction of the sheriff of Calhoun County over Camp McClellan?

In answer to your inquiry, I advise you that the only jurisdiction which you may exercise over Camp McClellan is that you may enter therein at any time for the purpose of service of process issued out of the courts of the State of Alabama.

Section 1505, Code of Alabama, 1923, provides that the State of Alabama has ceded to the United States of America jurisdiction over Camp McClellan, and such other lands within the confines of the State of Alabama, which may hereafter be purchased or otherwise acquired by the said United States, for certain purposes which are enumerated in said section.

Section 1506, Code of Alabama, 1923, provides as follows:

"1506. Duration of jurisdiction.—The jurisdiction ceded shall continue during the term the United States of America shall remain owner of the land so purchased, and shall be exclusive for all purposes except that the services of process issued out of the courts of the state of Alabama, shall not be prevented therein."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 2, 1929.

The Tax Collector,
Albertville, Marshall County, Alabama.

State and County have a lien, superior to all other liens, on the property of a taxpayer owned by him at any time during the tax assessment year, for payment of taxes assessable during such, no matter where in the State located; which lien continues on such property until such taxes are paid. Property of a taxpayer on which State and County have no lien may be levied on by Tax Collector and sold subject to any existing lien thereon.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of July 6th addressed to Honorable Henry S. Long, Chairman, State Tax Commission, has been referred by the State Tax Commission to me for reply. As I understand your letter, the following are the facts upon which you desire an opinion:

There was a joint assessment to Howard Powell and J. S. Walker in Morgan County for the tax assessment year beginning October 1, 1928, of certain property—personal property and intangible property. In obedience to the provisions of Section 223 of the Revenue Act 1919 (Acts 1919, p. 348) the Tax Collector of Morgan County made out and certified to the Judge of Probate of Morgan County a bill against said Howard Powell and J. S. Walker and procured the approval thereof by the said Judge of Probate in all respects as provided by law. Said Tax Collector finding no personal property of such taxpayers in Morgan County upon which to levy, forwarded the approved bill to the Tax Collector of Marshall County, in which County the said Howard Powell has personal property; on receipt of which approved bill, or writ of *fieri facias* , the Tax Collector of Marshall County, as provided by said Section 223, filed the same for record in the Probate office of Marshall County and without delay did give notice thereof to said Howard Powell, by registered mail, return receipt demanded. The said J. S. Walker has moved out of the State. Said Howard Powell has failed for more than thirty days to pay such taxes. The personal property of Howard Powell in Marshall County has been acquired by Powell since said assessment and such property has never been in Morgan County.

You wish to know if you have legal authority to levy such writ of *fieri facias* upon said personal property of Powell lying in Marshall County and sell the same for payment of such taxes.

In reply will say that said Section 223 of the Revenue Act, 1919, makes it your duty to do so. The lien provided by Section 416 of the Revenue Act, 1919 (Acts 1919, p. 449) covers all property of a taxpayer within the State. It is not confined to the County in which the assessment is made. It covers all property owned by a taxpayer on October 1st of any tax assessment year, or

acquired by him during the tax assessment year. If Powell owned the property located in Marshall County on October 1, 1928, the beginning of the assessment year in which said assessment was made, or has acquired it since October 1, 1928, the lien for State and County taxes attached and is superior to all other lien.

Yarbrough Bros. Hardware Co. v. Phillips, Tax Collector, 209 Ala. 341.

Its location in a County other than the County in which the assessment is made is immaterial.

Property acquired after the expiration of the tax assessment year, has no lien upon it for *ad valorem* taxes of such assessment year; but may be levied on and sold for taxes subject to any lien existing thereon at the date of the levy. There is no necessity for suit against the taxpayer, where there is personal or real property that may be levied on. Of course, when property is levied on in a County other than the County of assessment the statutes on the subject must be followed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 3, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Persons engaged in governmental activities not liable for tax under Section 2, Subsection 2-G, of the Act approved July 22, 1927 (General Acts 1927, p. 139)

Opinion by Special Assistant Attorney General Brassell.

Dear Sir:

I have your letter with enclosure, in which it is stated that John C. Webb & Sons have an agreement with and permit from the Federal Government to dredge sand and gravel out of the beds of the Warrior and Bigbee Rivers, the said sand and gravel to be deposited on barges and that under the contract the depth of the river is to be maintained at eight feet low tide. It is further stated that under said agreement and permit the sand and gravel are to be disposed of for commercial purposes.

Upon this statement of facts you request my opinion:

Does such operation by John C. Webb & Sons come within the purview of Section 2, Subsection 2-G of the Revenue Act approved July 22, 1927, (General Acts, 1927, p. 139)?

In answer to your question, I am of the opinion that said concern is not liable for the 3% tax provided by Section 2 of Subsection 2-G of the Act approved July 22, 1927 (General Acts 1927, p. 101).

For the proper understanding of the rights of the State of Alabama in and to the sand and gravel it is necessary to ascertain who owns the beds of navigable streams.

The right of the Federal Government to regulate commerce is not denied. Its right at all times to keep open the channel of the navigable rivers in this State is undisputed. However, the State of Alabama owns the beds of its rivers and it owns the sand and gravel that is being taken therefrom. The Federal Government would not have a right to dispose of the sand and gravel taken from the beds of navigable streams in Alabama. Its right in the premises is simply to provide a channel at proper depth to facilitate commerce. For instance, suppose that the channels of the Warrior or Bigbee Rivers contained coal. Would the title to said coal be in the Federal Government? I think not. Of course the Federal Government could dredge the coal out if it interfered with navigation, but it would have no right legal or equitable to dispose of the coal which would confessedly belong to the State of Alabama. And suppose that the channel of said rivers contained gold, diamonds, or other precious stones, could the title thereto be in the Federal Government? No, the Federal Government could only remove such precious stones or metals if they interfered with the navigation of said rivers, and if the Federal Government should attempt to dispose of the gold or precious stones that might be found in the bed of any navigable river in the State of Alabama, it would be guilty of converting to its own use the property of the State of Alabama and the State of Alabama would have a right of action against the Federal Government for the conversion of its property.

In the case of *McCready vs. Virginia*, 94 U. S. 391, there was considered a statute of the State of Virginia which prohibited any person from taking shell fish etc., from certain tide waters. In sustaining said statute against the charge that it violated the fourteenth amendment Mr. Chief Justice Waite delivering the opinion of the Court said: "The principle has long been settled in this court that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away * * *".

The State of Alabama has only granted to the Federal Government the right to regulate commerce. It has never ceded to the Federal Government its title to the beds of any of its streams whether navigable or otherwise. Therefore, the State of Alabama having never deeded, or ceded, or yielded in any way its right, title and interest in and to the beds of the navigable streams, still possesses a fee simple title therein.

Mayor of Mobile vs. Eslava, 9 Port. 577.

Webb vs. Demopolis, 95 Ala. 116.

William vs. Glover, 66 Ala. 193.

State ex rel vs. Alabama Power Co., 176 Ala. 625.

Mobile Transportation Co. vs. Mobile, 187 U. S. 482.

John C. Webb & Sons notwithstanding any agreement or permit which they might have with the Federal Government to remove sand and gravel from the channels of the rivers hereinbefore named could not use the sand

and gravel for commercial purposes. The Federal Government could not do that without accounting to the State of Alabama. It necessarily follows that said concern is not liable for the 3% tax under the Act, *supra*. However, for every yard of sand and gravel that they have disposed of they are liable in damages to the State of Alabama because said concern if they have disposed of any of the property of the State of Alabama would be guilty of converting to their own use or to the use of another property which confessedly belongs to the State of Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 3, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

1. Final record of a case in the County Court, for which the *ex officio* Clerk of the County Court receives fees or compensation for recording, consists of the record, in a well bound book, within six months after the final determination of the case, of all the proceedings relating thereto, except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions, and except orders and judgments entered upon the minutes of the Court.

2. Final record of criminal case, in the Circuit Court, where indictment is found, for which the Clerk of the Circuit Court receives fees or compensation for recording, consists of the record in well bound book of all proceedings relating to such case, except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions, and, except orders and judgments entered upon the minutes of the Court.

3. Final record, in the Circuit, of a case tried in the County Court and defendant convicted, who appeals to the Circuit Court, consists of the record, in well bound book, within six months after the final determination of the case, of what is stated in headnote 2 hereof. What is required of the *ex officio* clerk of the County Court by Section 3839 of the Code of Alabama, to be handed over to the Clerk of the Circuit Court, should be recorded; and constitutes, when so recorded, part of such final record.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of May 24th is acknowledged. You ask my opinion as to the following:

1. What constitutes what is known as "final record" in the County Court?
2. What constitutes final record in criminal cases in Circuit Court where indictment is found?

3. What constitutes a "final record" in a case tried and convicted in the County Court and appealed to the Circuit Court?

In reply will answer your questions in the order stated.

1. The County Court is entirely statutory. It does not seem to have been originally intended to be a Court of Record. Nothing of the kind is anywhere in the statutes mentioned. But, nevertheless, the Clerk of the County Court is required to make final record in the County Court in all cases where final record of a similar matter is required in the Circuit Court. This was unintentionally accomplished by the Legislature in a most extraordinary way. Under the Code of 1907, Sections 6696 to 6732, both inclusive, the county courts were provided for. By Section 6698 thereof the judges of the county courts were declared to be clerks of their respective courts. Under this Act, no final record of the proceedings in said court was required.

Under the Code of Alabama, 1923, the judges of the county courts were not made clerks of their courts, but the following two sections were added in place thereof:

"Section 3803. The Clerks of the Circuit Courts of the several counties of the State are made *ex officio* clerks of the county courts of their respective counties."

"Section 3804. The fees and compensation of said Clerks for their duties as clerks of the county court shall be the same as now allowed by law to clerks of the circuit courts in criminal cases and shall be paid in like manner."

In the case of *Swindle, County Treasurer v. Crocker*, 217 Ala. 199, the Supreme Court of Alabama holds that the above copied Section 3804 has the effect to not only provide the same fees and compensation to clerks for services in the county court as are allowed clerks of the circuit court in criminal cases, but to require the performance of the same duties in the county court as are required of them in the circuit court. Since a final record is required to be made of criminal cases in the circuit court by the clerk thereof, the same duty is required of him as *ex officio* clerk of the county court.

In other words, as I understand the decision in the case named, it holds that said Section 3804 not only requires the same fees and compensation to be paid the *ex officio* clerk of the county court as are now paid to the clerk of the circuit court in criminal cases where the statutes specifically require a duty of such *ex officio* clerk, but, impliedly, requires the *ex officio* clerk of the County Court to perform in the county court, every duty required of the clerk of the Circuit Court in the Circuit Court, in criminal cases, where a fee or compensation is provided for the Clerk of the Circuit Court.

The holding of the Supreme Court as to the interpretation of a statute is, for all practical purposes, the true interpretation of the statute.

What shall go into the final record in the County Court is judged upon the same theory as to what shall go into the final record in the Circuit Court, for the recording of which the Clerk of the Circuit Court would get a fee or

compensation. There can be no implied duty in such a case where no fees or compensation is provided.

The object, it would seem, of final record of a criminal case is to preserve a complete history of the proceedings; and all such papers, documents, orders and judgments as constitute part of the history of the case must be recorded in the final record, provided the Clerk of the Circuit Court receives fees or compensation for similar work in criminal cases in the Circuit Court.

2. What constitutes final record in a criminal case in the Circuit Court where indictment is found depends on what is done in the court proceedings in such case. Commencing with the indictment, every pleading, order, the verdict of a petit jury, if tried by a jury, the judgment upon the verdict, etc., depending on what is done in the case before, during and subsequent to trial, unless a statute provides otherwise. It is difficult to say in the abstract, what that may be.

3. What constitutes final record in the Circuit Court, in a case tried and convicted in the county court and appealed to the Circuit Court? This question is answered substantially by subdivision 9 of Section 6724 of the Code. This subdivision makes it the duty of the clerk, in criminal cases:

To record in a well bound book, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions.

These matters excepted constitute no part of the final record in the Circuit Court, in criminal cases, nor in the County Court, for which a clerk receives fees or compensation for recording.

Section 3839 of the Code provides:

"When an appeal is taken under the preceding Sections, the Clerk of the County Court shall make a copy of all the proceedings had in his court, except the subpoenas for witnesses and the appeal bond, certify the same as correct, and hand the transcript, together with the appeal bond, to the Clerk of the Circuit Court, who shall place the same on the trial docket of criminal cases."

In my opinion, what is required of the clerk of the county court to be handed to the clerk of the circuit court, on appeal from county court to circuit court, constitute part of "the proceedings relating thereto" and must be recorded in the final record in the circuit court, together with all that is subsequently done in the circuit court "except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

By Section 10126 of the Code, "orders, judgments and decrees entered upon the minutes of the court are parts of the record of the causes to which they pertain, and need not be copied into the final record. If so copied, no fee shall be charged therefor."

The above applies to criminal as well as to civil cases.—**Carmichael v. Matthews**, 134 Ala. 210. It applies, in my opinion, in the County Court as well as in the Circuit Court.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 3, 1929.

Hon. C. L. Mullin, President,
Phenix-Girard Bank,
Phenix City, Alabama.

The County Treasurer, or custodian of county funds, not responsible for money paid to the Judge of Probate, on redemption of land sold for taxes, until after such funds shall have been deposited or remitted by the Judge of Probate, as provided by Sections 3116 and 3117 of the Code, 1923.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of July 23rd is acknowledged. You state that the Phenix-Girard Bank is custodian of the funds of Russell County and you desire my opinion as to whether or not said bank is responsible for funds paid to the Judge of Probate under Section 3115 of the Code of Alabama.

In reply will say that, in my opinion, the County Treasurer, or custodian of county funds, is not responsible for funds paid to the Judge of Probate under the provisions of Section 3115 of the Code, but is responsible for funds deposited with him, or it, by the Judge of Probate under the provisions of Section 3116 of the Code and also of funds remitted to him, or it, by the Judge of Probate under Section 3117 of the Code.

In other words, Section 3115 requires the Judge of Probate, "upon the payment of the amount required by law for the redemption of the lands sold for taxes by a person entitled to redeem," to issue to "such person a certificate of redemption describing the lands, setting forth the facts of the sale, substantially as contained in the certificate of purchase, the date of redemption, the amount paid, and by whom the lands were redeemed."

The Judge of Probate on issuing this certificate to the person redeeming, is required "to give notice of the redemption to the County Treasurer, or to the custodian of the county funds." The person redeeming, after receiving such certificate, must present the certificate to the County Treasurer, or custodian of county funds, and upon such presentation the County Treasurer, or custodian of county funds, shall countersign such certificate.

It will be seen, that it is not required that the Judge of Probate shall deposit or remit such funds to the County Treasurer or custodian of county

funds, prior to the countersigning of the certificate by the County Treasurer or custodian of county funds. After receiving such notice of redemption from the Judge of Probate, the County Treasurer or custodian of county funds must countersign the certificate of redemption when presented by the person to whom it was issued. The countersigning of the certificate by the County Treasurer, or custodian of county funds, is no evidence that the funds paid to the Judge of Probate on such redemption have been paid over by the Judge of Probate to the County Treasurer or to the custodian of county funds. The evidence of the deposit or remittance must be found elsewhere. The Judge of Probate should obtain and keep evidence of deposits and remittances whenever made.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 5, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Licenses—cigarettes, soft drinks, filling station, etc.—payment of.

Opinion by Special Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 17, 1929, in which you state that a landlord who operates a large farm carries some stock in a commissary which he sells to his tenants but does not sell to the general public, he claiming that this is simply a method of advancing to tenants and that he should not be required to pay a license simply because he prefers to carry a stock of supplies instead of buying them for the tenants as their needs arise. You further state that he sells automobile accessories, cigarettes, soft drinks and operates a one pump filling station.

You request my opinion:

Is a landlord who sells cigarettes, soft drinks, automobile accessories, and operates one pump filling station liable for the payment of a license tax on such business?

In answer to your question I am of the opinion that where a person whether a landlord or not operates a business selling goods, wares and merchandise including soft drinks, cigarettes, and the operation of a filling station he is liable for the license imposed by the license schedule on such commodities.

General Acts of Alabama, 1919, p. 404-445.

This party is a dealer. Many of the license schedules read "every dealer,

firm or corporation etc." That being so he should pay the license on the commodities sold as per the cited Act, *supra*.

The words "every dealer" means "all the parts which compose a whole collection or aggregate number, considered in their individuality; all, taken separately one by one, out of an indefinite number.—Webster's International Dictionary.

It is a matter of common knowledge that a landlord (such as the one inquired about) makes a profit on the sale to his tenants whether or not he has a little commissary advancing to them exclusively or not. That being so he should pay a license for the sale of cigarettes, soft drinks, automobile accessories and for the operation of the one pump filling station.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 5, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Solicitors: Fees and Commissions.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 29, 1929, in which you state:

"Please refer to Section 3738, Code of Alabama, 1923, and in the subdivision thereof on page 197, which has reference to the commission on forfeitures collected by the Clerk or Sheriff, and advise whether or not, of such commissions as are collected, the five (5) per cent thereof shall be taxed as costs and in addition to the amount of the judgment?

"In considering this matter please give direct consideration to the language of the first expression under Section 3738 which states that 'the following solicitor's fees shall be taxed against the defendant on conviction to be collected as other costs.'

"In a case where a forfeiture is taken against defendant and bail say for \$1,000.00 and the Governor remits \$900.00 of said forfeiture, please advise whether or not the commission of five per cent should be charged on the \$1,000.00 or \$100.00 judgment which is collected by the Sheriff or Clerk?

"Please advise whether or not this item is to be taxed as a part of the costs of the judgment or to be collected in addition to the amount of the forfeiture?

"In a case where a forfeiture is taken against defendant and bail made final for say \$1,000.00, the amount of the bond, and the execution

is placed in the Sheriff's hands, and the costs, as the Clerk has attached to the cost bill of the judgment, embrace the item of \$50.00 solicitor's fee, which is five per cent of the amount of the judgment, and the execution on such judgment having been placed in the sheriff's hand, and having been held by said sheriff for more than ninety (90) days, is the sheriff liable on his official bond for the costs in the case even though subsequent to the expiration of the ninety days the Governor has seen fit to remit \$900.00 of the forfeiture? You will understand that in this case the Sheriff is required by law to make return within ninety days, and in this instance has failed to do so."

You request my opinion:

1st. Is the five (5) per cent commission allowed solicitors for collecting forfeitures taxed as costs and added to the amount of the judgment?

2nd. In a case where a forfeiture is taken against a defendant and bailed for \$1,000.00 and the Governor remits \$900.00 of said forfeiture, please advise whether or not the commission of five (5) per cent should be charged on the \$1,000.00 or \$100.00 judgment when collected by the Sheriff or Clerk.

3rd. In cases where a forfeiture is taken against a defendant and bailed and made final for \$1,000.00, the amount of the bond, and the execution is placed in the Sheriff's hands and the costs that the Clerk has attached to the cost bill judgment embraces the item of \$50.00 solicitor's fee which is five (5) per cent of the amount of the judgment and an execution and such judgment having been placed in the Sheriff's hand and held by the Sheriff for more than ninety days, is the Sheriff liable on his official bond for the costs in the case even though subsequent to the expiration of the ninety days the Governor has seen fit to remit \$900.00 of the forfeiture?

Under Section 3738 which fixes the fees which may be taxed and collected in all criminal cases as Solicitors' fees we find in a subsection of this Section the following provision:

"On all forfeitures collected by the Clerk or Sheriff five (5) per cent thereof."

My answer to your first inquiry is in the affirmative. Solicitors' fees and commissions are to be taxed and collected as other costs, which shows plainly to my mind that the fees and commissions of solicitors are regarded as costs.

Section 3738, Code of Alabama, 1923.

As to your second request it is my opinion that five per cent commission could be collected only on the \$100.00. Under Section 5127, Code of Alabama, 1923, the Governor has the power to remit fines and forfeitures and when he remits fines and forfeitures or reduces a fine or forfeiture it is final. There can be no appeal from his action in such matters and it stands as though his action were the original judgments in the case.

Section 7814 of the Code of Alabama, 1923, provides that the Sheriff shall return all executions placed in his hands within ninety days and if he fails to make return or forced payment of judgment within the time allowed by Section 7814, supra, then under Sections 10231, 10232 and 10233, Code of Alabama, 1923, he may be proceeded against summarily. If the proceedings were under Section 10232, supra, for failure to return an execution the amount to be collected would be twenty per cent of the judgment.

If it were under Section 10233, supra, his failure to make money on execution then in this event if there were a recovery the amount would be for the amount of the execution, interest and ten per cent damages thereon. I think the Sheriff would be liable for the cost of court but not for the five per cent of the forfeiture which was originally \$1,000.00 but only five per cent of the \$100.00, the amount to which it was reduced by the Governor.

In case of suit I think the Sheriff could plead and prove the action of the Governor in remitting same even though he had failed to collect the money within the ninety days he had the execution in his hands.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 5, 1929.

The Judge of Probate,
Tuscumbia, Colbert County, Alabama.

Prisoners: County pays fees and expenses for removal.

Defendant must be tried before county authorized to pay removal expense.

Amount of removal fees and expense set out in Section 3741 of Code.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of July 9, 1929, in which you state that for the past several months while repairs were being made on the Colbert County Jail, the Colbert County prisoners were ordered to be kept in the Lauderdale County Jail. In addition to removing the prisoners from the Colbert County Jail to the Lauderdale County Jail, it has been necessary for the Sheriff to make numerous trips to Florence, Alabama, to remove them to the Colbert County Court House for trial and then return them to Florence.

You request my opinion on the following propositions:

1. Please advise whether the County should pay the fees and expenses for the removal of the prisoners under the conditions mentioned above or whether the county should pay in certain cases and the State in others.

2. Please also advise whether it is necessary before the county can pay such fees that the defendant be tried. I note that there are two paragraphs covering a case of this kind under Section 3741 of the Code and I do not know which paragraph is applicable.

3. Please kindly advise me fully as to what fees and expenses the county should pay in these cases.

Answering your first question, I am of opinion and so advise you that Colbert County should pay the fees and expenses of the removal of prisoners under the conditions you mention. The county in which the offense is committed, and the case is triable, is the county which should bear this expense. The State pays no part of these fees and expenses. The answer to this inquiry is fully covered by Section 3741, Code of Alabama, 1923, in the last paragraph beginning on page 199 and ending on page 200. This paragraph reads as follows:

"For removing any prisoner in cases where there is no jail in the county in which the offense is committed, or the jail therein is insecure, to the jail of another county, and for returning him to the jail of the county from which he was removed or to court for trial, three dollars for himself or his deputy acting in his stead, and two dollars for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be taxed against, and paid by such prisoner, on conviction, or, if he is insolvent, or is acquitted, by the county in which the offense was committed; but in no case shall the county to which such prisoner was removed be liable for such costs or fees."

Answering your second question I am of opinion that these expenses cannot be paid until after the defendant has been tried. You will note in the paragraph above quoted that these expenses are taxed against and paid by such prisoner on conviction or, if he is insolvent or is acquitted, then and not until then are the expenses borne by the county.

You are further advised that the answer to your third question is also covered by the paragraph of Section 3741, above quoted. Under the provisions of this paragraph the sheriff, or his deputy acting in his stead, is entitled to \$3.00 for each day he is engaged in such removal and he is further entitled to \$2.00 for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made.

See Report of Attorney General, 1926-28, p. 114.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 6, 1929.

Clerk of the Circuit Court,
Florence, Lauderdale County, Alabama.

Hard labor agents—services of dispensed with where counties deliver county convicts to State under Act approved February 18, 1927, which regulates the custody, care, maintenance, and use of the county convicts by the several counties of the State and by the State through its State Board of Administration.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of July 1, 1929.

You request my opinion:

Is it necessary for counties to have hard labor agents under an Act approved February 18, 1927, (General Acts 1927, p. 52-55) which provides for the turning over of county convicts to the State Board of Administration?

In answer to your inquiry, I advise you that, inasmuch as said Act provides that all convicts who are sentenced to hard labor for the county shall thereafter, during the life of the contract entered into by and between the Court of County Commissioners or Board of Revenue with the State Board of Administration, be delivered to said Board of Administration, the necessity for a hard labor agent is dispensed with. Under said Act, said Board of Administration performs the duties of a hard labor agent.

The foregoing does not apply to counties which have not turned their convicts over to the State. Under the provisions of said Act, it is discretionary with the Courts of County Commissioners or Boards of Revenue of the several counties of the State to deliver to the State Board of Administration county convicts who have been sentenced to hard labor for the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 6, 1929.

The Judge of Probate,
Bay Minette, Baldwin County, Alabama.

License tax—Oculist, Optometrist or persons selling eye-glasses.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 10, 1929, in which you state that under an Act approved July 22, 1927 (General Acts 1927, Section 12, p. 155) that persons

selling eye-glasses shall pay the State five dollars but no license shall be paid the county.

You request my opinion:

1. Advise me regarding persons selling or offering for sale eye-glasses in towns of not less than one thousand inhabitants.
2. Advise me the proper amount to collect for license for selling eye-glasses by persons within towns of less than one thousand inhabitants.

In answer to the first question I am of the opinion there is a license of \$5.00 required of each oculist, optician practicing his or her profession or any person, firm or corporation selling or dispensing spectacles or eye-glasses in cities or towns of one thousand population or under, but no license shall be paid to the county.

General Acts of Alabama, 1927, p. 155 Section 12.

Biennial Report of Attorney General 1926-28 p. 649.

In answer to your second question I am of the opinion the proper amount to be collected as a license for selling eye-glasses by each person, firm or corporation is five dollars, authorities supra.

Under the license schedule, supra, the classification is rested upon cities and you will observe that schedule 12 of the Act, supra, places a license tax upon each oculist, optometrist or optician practicing his or her profession or any person, firm or corporation selling spectacles or eye-glasses in cities of the population, etc. You will observe that by the term of schedule 12 of said Act, oculist, optometrist and opticians are exempt from license for practicing their profession for a period of two years from the time such person begins the practice of the profession named.

In an opinion of July 2, 1928 addressed to the Judge of Probate, Franklin County, Alabama (Biennial Report Attorney General 1926-28 p. 649) I held that the schedule mentioned imposed a license for two separate activities, viz.: first, a license for the practice of the professions specified, and, second, a license on persons, firms and corporations for the sale or dispensing of spectacles or eye-glasses.

An oculist is a person skilled in the treatment of diseases of the eye, and makes optical instruments, and also applies to a person who fits glasses for the eye. An optometrist is one who fits glasses to the eye, and who is familiar with the science of optics. An optician, as the expression is here used, refers to one skilled in the science of optics, and who fits glasses for the eye, and is, in my judgment, practically synonymous with the word "optometrist" as used in said schedule. An oculist, optometrist or optician may practice his profession and yet not sell spectacles or eye-glasses.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 6, 1929.

State Tax Commission,
CAPITOL.

Corporations—capital stock defined—Increase or decrease in capital stock—construing Section 7003, Code of Alabama, 1923.

Opinion by Assistant Attorney General Cobb.

Attention: Mr. Frontis H. Moore.

Gentlemen:

I have your letter of recent date in which you give the following statement of facts:

Prior to 1928 the Birmingham Slag Company was a par stock corporation with authorized capital stock of \$500,000 common and \$50,000 preferred and a total paid in capital stock of \$409,600.00. On the said date of June 1927, a resolution was adopted which is set out in the paper attached hereto, providing that in lieu of the capital stock outstanding there be issued five thousand shares of common stock without nominal or par value in lieu of the present authorized capital stock. Subsequent, at just what date I do not have, the stockholders or board of directors met and took further action in substance as follows:

That the capital stock be reduced from the figure of \$409,600.00 to \$104,913.45, and that in lieu of the other stock held by them the stockholders take "debenture certificates" of the corporation. This is evidenced in the balance sheet as fixed liabilities in the amount of \$1,283,300.00, this amount representing the surplus and the excess of capital stock over and above the \$104,913.45. Upon the Probate Judge of Jefferson County advising us that there had been no reduction of capital stock filed in his office, we requested payment on the sum of \$409,600.00, the amount paid in previous years.

Under the above statement of facts you request my opinion on the following questions of law:

1. Whether the assessable amount for franchise purposes of the five thousand shares of no par value stock, which were provided for by the resolution of June 29, 1927, do not represent and constitute the same value so far as capital stock is concerned, as the previous amount of par stock which was issued and outstanding and in lieu of which the five thousand shares of no par stock were issued.

2. Whether the corporation had any authority after passing such resolution and issuing such no par stock, to reduce the same by issuance of "debenture certificates" to the stockholders in lieu of their stock.

3. Whether Section 7003 of the Code of 1923 applies merely to the change in authorized capital stock, or whether it does not also apply to paid up capital stock, it being my understanding that stock once issued cannot be reduced or cancelled except in the manner provided for by such section.

Answering your first question I am of opinion that it does. The five thousand shares of no par value stock which were issued in place of the par stock represent and constitute the same value so far as capital stock is concerned.

Answering your second question, I am of opinion that the corporation did not have the authority after passing the resolution mentioned and issuing such no par stock, to reduce the same by issuance of "debenture certificates" to the stockholders in lieu of their stock.

Answering your third question, I am of opinion that Section 7003, Code of Alabama, 1923, applies to paid up capital stock as well as it does to authorized capital stock. Capital stock once issued must be increased, reduced or cancelled strictly in accordance with the provisions of this Section of the Code.

Our Supreme Court speaking through Chief Justice Brickell in the case of Granger Life and Health Insurance Co., vs. Kemper, 73 Ala. 327, says:

"Where a corporation relies upon a grant of power from the Legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise, as it is to the particular thing to be done."

See also Fitzpatrick vs. Dispatch Publishing Co., 83 Ala. 604.

In an opinion rendered by this office to you under date of September 12, 1927, it was held:

"The amount of capital stock, as measured by money, is declared in incorporating a par value stock corporation and consists of "the sum fixed by the corporate charter as the amount, measured by dollars, paid in or to be paid in, by the stockholders for the prosecution of the business of the corporation, and is a trust fund for the benefit and security of the creditors of the corporation." This amount cannot be lawfully reduced by payment of dividends to stockholders, nor can it be increased except in the manner provided by statute. Such being the case, the assessment of the franchise tax due by a par value stock corporation, being but a mathematical calculation, is a ministerial act; in the case of a non-par value stock corporation, it is my opinion that capital stock of the corporation is best defined as the assets of the corporation upon which the corporate charter is issued and which constitutes a trust fund for the benefit and security of creditors of the corporation, which cannot be lawfully taken from in declaring dividends to stockholders. Such assets, as are not money, are not measured by money for the purpose of incorporation. The value in money of such assets at each period of assessment of franchise tax is the correct measurement for franchise tax assessment.

"In determining, at any time what constitutes the trust fund, the law with reference to trust funds must be applied. This trust fund constitutes the capital stock. Its monetary value at the time for the franchise tax assessment constitutes the measure for the franchise tax."

In the case of *Randle vs. Winona Coal Company*, 206 Ala. 254, these pertinent expressions are found:

"It is important to keep in mind our definition of stock in a corporation; it is only evidence of the right of the holder or owner to share in the proceeds of the corporation's property, and typifies an aliquot part of the corporation's property, or the right to share in its proceedings, to the extent indicated when distributed according to law and equity."

Hall & Farley vs. Alabama T. Imp. Co., 173 Ala. 398, *Marbury Lumber Co. vs. Hunter*, 169 Ala. 503.

"A corporation has no implied power to change its capital stock provided for in its charter as originally granted or amended, under the Code of 1907, Section 3446, subdivision 4, and can effect such change only by compliance with Section 3480 (Code, 1923, Section 7003)."

The further effect of this decision is to hold that "the right" of the corporation "to exercise the power to amend a corporation charter and the validity of such amendment are to be determined largely on whether or not such conduct was fundamental or otherwise. (1) If fundamental, a substantial compliance with the statutory requirements is necessary; (2) if not fundamental, but is in respect to the *modus operandi* merely—a mere change of the instrumentality and agency—then formalities merely directory are not required." Further, that a proposed amendment seeking to authorize a change in the par value of the shares of stock from so much per share to non-par value stock, and an increase or decrease thereof is fundamental.

Section 7003 specifically provides for a decrease in capital stock and the ways in which this may be accomplished. That it applies to paid up capital is made certain by the provision for the purchase by the corporation of outstanding stock as a means of effecting a reduction.

Decreasing the capital stock is a fundamental matter; it is a matter totally different from the matter of changing the shares from par value to non-par value. The assent given by the shareholders, at a meeting called for that specific purpose, to a proposal to change the par value of the stock, could in no wise be said to include an assent to a proposal, not mentioned at the meeting or in the notice calling the meeting, to reduce the capital stock of the corporation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 9, 1929.

Hon. Bibb Graves,
Governor of Alabama,
CAPITOL.

Governor has authority to negotiate temporary loan not to exceed three hundred thousand dollars, to meet deficiencies in the treasury, provided the interest thereon does not exceed fifteen thousand dollars during any one year.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of this date is acknowledged. You wish my opinion as to whether or not you, as Governor of the State of Alabama, are authorized to negotiate a temporary loan not to exceed three hundred thousand dollars as provided by Section 213 of the Constitution.

In reply will say that by subsection (13) of Section 17 of Act No. 584, approved September 7th, 1927 (Acts 1927, p. 686) there is appropriated the sum of Fifteen Thousand Dollars, or so much thereof as may be necessary, to pay the interest on such a loan. It is a matter of common knowledge that such loans, as a rule, carry about five per cent interest per annum. In my opinion, the appropriation of Fifteen Thousand Dollars per annum, or so much thereof as may be necessary to pay the interest such loan necessarily implies the authority to negotiate such a loan, not in excess of the constitutional limit; to the extent, at least, that Fifteen Thousand Dollars will pay the interest thereon. A necessary implication serves every purpose of express authority.

Swindle v. Croker, 217 Ala. 199.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 9, 1929.

The Judge of Probate,
Decatur, Morgan County, Alabama.

Exhuming dead bodies—Compensation therefor.
Construction of Section 9587, Code of Alabama, 1923.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of July 24, 1929. You state that it has become necessary for you as Probate Judge of Morgan County to issue an order by which to obtain the chemical analysis of the contents of the stomach of a child, and to that end it became necessary to have the body exhumed and reburied.

You state that it was necessary to employ labor to dig up said body and rebury the same, and also to employ a physician to remove the stomach and contents. You have received a statement from the State Chemist for his services for making said analysis to the amount of \$100.00.

You request my opinion:

Should the \$100.00 payable under Section 9587, Code of Alabama, 1923, be proportioned between the State Chemist, and the parties claiming other expenses incident to the exhuming of said body.

In reply to your inquiry I advise you that Section 9587, Code of Alabama, 1923, states that "the costs and expenses incurred therein, **not exceeding one hundred dollars**, must be paid by the county on the order of the court of county commissioners; and the State Chemist shall make such analysis whenever employed so to do by the probate judge."

Said section is conclusive of the maximum expenditure which may be made by counties for the exhumation of a dead body.

The amounts which the grave diggers, physicians and State Chemist shall receive for their services is for the consideration of the probate judge alone. There is no authority of law which requires that the \$100.00 allowed for such services may be prorated. This is a matter which addresses itself to the judgment of the probate judge in entering into contractual relations with the parties necessary to the performance of said duty.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 10, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Seizure fees.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 19, 1929, in which you state that in many instances where a defendant is charged with violating the prohibition law and the only entry on the docket is "nol prossed" or "not guilty" and that the sheriffs present their claims against the Fine and Forfeiture Fund for so many miles of travel at ten cents per mile, and so much for drayage in transporting, and a fee of \$3.00 indicating that the liquor seized was between one and five gallons, or a fee of \$5.00, indicating that the liquor seized was between five gallons and twenty gallons, or a fee of \$10.00, indicating that the liquor seized was twenty gallons, or over, and \$3.00 additional per day for

services rendered, and that the same is made a claim against the Fine and Forfeiture Fund. You further state that the Examiner is without any record, proof or evidence to show that the amount of liquor was transported, or the miles traveled, the days spent or drayage paid for. The judgment entry of the court being either "not prossed" or "not guilty." Based upon these facts, you request my opinion:

Would the sheriff be entitled to a claim against the Fine and Forfeiture Fund for such fees in such cases?

Before answering your inquiry, it is necessary in my judgment to construe all laws relating to fees of officers under the prohibition law in the order in which fees are provided and the method by which they are to be paid.

The first fee provided for the officer or other person in the enforcement of the laws relating to prohibited liquors is found in Section 4626 of the Code of Alabama, 1923, and provides a fee of \$50.00 for the officer or other person furnishing evidence to support a conviction for the unlawful distilling of prohibited liquors. The fee so provided to be taxed or charged in the bill of costs and to be collected as other items of costs.

Section 4654 of the Code, *supra*, provides a seizure fee to be taxed on conviction, viz.: If the liquor seized is not less than one gallon, nor more than five gallons, the fee is three dollars; if more than five gallons and less than twenty gallons, the fee is five dollars, and if more than twenty gallons, the fee is ten dollars.

You will note that the seizure fees above referred to are predicated upon a conviction and it was undoubtedly the legislative intent that there should first be a return by the officer of the number of gallons seized and a judicial ascertainment of the amount together with an order by the court for the destruction of said prohibited liquors before seizure fees can be paid under this Section of the Code.

Article 3, Section 4659 of the Code of Alabama, 1923, provides a fee of \$50.00 to be charged in the bill of costs and paid to the sheriff or other person furnishing the evidence for such convictions and the person entitled to said fee must receive from the judge presiding a certificate before said sum can be paid.

Article 6 of the Code of Alabama, 1923, provides for the abatement of liquor nuisances by proceedings in courts of equity to perpetually enjoin such nuisances. The fees allowed the officer making the seizure under Article 6 *supra*, is provided by Section 4682. The seizure fee being made in obedience to a writ of injunction is three dollars, and ten cents for every mile traveled in making the seizure, together with such reasonable sum as the court may allow or deem just and necessary for expense incurred in transporting and providing storage for seized liquors; all of which costs shall be taxed in the bill of costs, and if not collected from a defendant, it is then taxed and paid as in criminal cases in which the State fails.

You will note from a careful reading of Article 6 supra, that a written return must be made by the officer as to the amount of liquor seized and the number of miles traveled etc. And the seized liquor must be brought before the court for an order for its destruction, a judicial ascertainment as to the amount of fees to be allowed the officer. The words "to be taxed and paid as in other criminal prosecutions in which the State fails," means that then the fees are to be paid out of the fine and forfeiture fund.

Article 10 of the Code of Alabama, 1923, provides for the destruction of prohibited liquors. This Article also provides for the issuance of search warrants. Under Section 4750 of the cited Article of the Code the officer executing the search warrant and seizing prohibited liquors must make a return in writing as to the amount of liquor seized. And by Section 4752 the seized liquor must be kept subject to the order of the court upon a trial. Under the hereinbefore cited Article of the Code the seized liquor cannot be destroyed except upon an order of the court.

Section 4761 of Article 10 provides the method for the payment of seizure and detention fees, and if the State fails, the fees are taxed and collected out of the fine and forfeiture fund. You will note the words "to be taxed and paid as in other criminal prosecutions in which the State fails" means that the fees are to be paid out of the fine and forfeiture fund are not payable under Section 4654 of the Code. It simply means as fees are paid ordinarily in all criminal prosecutions wherein the State fails.

Section 4768 provides also for the sum of \$3.00 for the officer making the seizure and the sum of \$2.00 for every day such officer is employed in attending court, the sum of ten cents for each mile traveled, in executing the writ, together with such reasonable sum as the court may deem necessary for transporting and storing such liquors; the costs to be taxed and if not collected from the defendant, then it is paid as in criminal cases wherein the State fails, i.e., fine and forfeiture fund.

Under Section 4775 of the Code of Alabama, 1923, the officer must destroy all liquors together with the illicit still or appliances found in or about the operation of a still.

You will note that this is the only authority for the destruction of liquor by an officer. All other liquor seized must be kept by the officer and a return made before any fees can be allowed or paid.

Section 3741 of the Code of Alabama, 1923, provides fees and allowances to sheriffs. That section reads in part as follows:

" * * * When a sheriff captures or arrests a defendant with contraband or prohibited liquors or beverages, either with or without warrant, there shall be taxed in his favor against the defendant on conviction, in addition to any other fees and charges now allowed by law, ten cents per mile each way from the courthouse to the place of arrest, and all expenses for the transportation of the contraband or prohibited liquors and beverages from the place of arrest to the courthouse."

You will note that the quoted part of Section 3741 *supra*, predicates the payment of fees upon conviction. That Section as well as Section 4654 is constituted in *pari materia* insofar as seizure fees for the seizure of contraband liquors is concerned.

Section 3738 of the Code of Alabama, 1923, provides solicitor's fees and are predicated upon a conviction. Reading the sections, i.e., 3738, 3751, and 4654, I can come to no other conclusion than that it is the intent of the law to predicate the seizure fees therein referred to upon a conviction.

Answering your question in the inverse, I am of the opinion that no seizure fees or mileage can be paid the officer until there has been first a conviction; 2nd, a judicial ascertainment of the amount of liquor seized and the number of miles traveled, and an order of the court for the destruction of such liquor, and I further advise you that no seizure fees can be paid out of the fine and forfeiture fund to the officer for seizing a quantity of liquor less than one gallon. It necessarily follows that if the docket shows only the order of "not prosessed" or "dismissed" such officer would not be entitled to any seizure fee. Because it is but rationalable to conclude that if the trial docket shows the order of "not prosessed" or "dismissed," or an acquittal that there has been no seizure of liquor, and hence, there can be no payment of seizure fees.

Opinions of Attorney General, August 3, 1929, Book 13 (office edition)

Opinions of Attorney General, August 2, 1929, Book 13 (office edition)

Code Sections, *supra*.

All former opinions in conflict with the foregoing opinion are hereby withdrawn and overruled.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 10, 1929.

Tax Collector,
Athens, Limestone County, Alabama.

Taxes—escape assessments of interest and penalties.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 29th in which you state that the Tax Commission has forwarded to you five assessments against Claud H. Hutceson of Jonesboro, Georgia.

You request my opinion:

1. Advise me what interest charges should be made on these assessments, whether they should be charged from year to year or not?
2. In case the Tax Collector should fail to find at the present time property in this County belonging to the said Hutceson what course should I pursue?

In answer to your first question I am of the opinion that you can collect no interest on escape assessments.

Section 3056, Code of Alabama, 1923, Biennial Report of Attorney General, 1920-22, p. 265.

In answer to your second question I advise you that in the event that the Tax Collector should fail to find any property in your County which he could subject to the payment of such taxes he should make out and certify to the Judge of Probate a bill against said Claud H. Hutceson for the amount of such taxes and penalties due the Assessor or Collector; and upon the approval thereof by the Judge of Probate, endorsed in writing such bill shall operate as a writ of fieri facias which the Tax Collector may send the same to any Tax Collector in the State wherein the taxpayer has property which would be subject thereto.

Section 3077, Code of Alabama, 1923.

Under Section 3056 of the Code, supra, it will be noted that it applies only to delinquent taxes and not to delinquent assessments. There being no delinquent taxes charged against the said Hutceson he would not be liable for interest. You could only collect the 10% penalties on escapes. While in a sense an escape tax is a delinquent tax yet the Legislature has seen fit to treat escape taxes and escape assessments separately.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 12, 1929.

State Tax Commission,
CAPITOL.

Government reservations—service of process upon by license inspectors and sheriffs.

Opinion by Assistant Attorney General Koonce.

Gentlemen:

I have your letter of July 24th, 1929. You refer to my opinion of July 6, 1929, to you in which I held that a contractor who contracts with the United States Government for the erection of a hospital should be required to pay contractor's license. You state that the License Inspector of Macon County has advised you that the person in charge of the United States Hospital at Tuskegee has forbidden the Inspector to enter the reservation to collect license from a contractor who is erecting a hospital thereon.

You request my opinion:

Can the License Inspector or the Sheriff of Macon County, notwithstanding the order of the official in charge forbidding them entering the reservation, enter the reservation for the purpose of executing a warrant on the person who has not paid contractor's license?

In my opinion your question must be answered in the affirmative.

Section 3161, Code of Alabama, 1923, provides that the Governor is authorized to cede to the United States jurisdiction over lands acquired in the State of Alabama for the use of the United States. You will observe, however, that said Section provides that the jurisdiction thus ceded does not prevent the execution by the State of process, civil or criminal.

Schedule 34 of Section 361 of an Act approved September 15, 1919 (General Acts 1919, p. 406) provides that any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure shall be required to pay a license.

The authorities of the State of Alabama can enter government reservations for the purpose of executing civil and criminal process:

Section 3161, Code of Alabama, 1923, supra,
Webb vs. J. G. White Eng. Corp., 85 So. 729,
Fort Leavenworth Railroad Co. vs. Lowe, 114 U. S. 525,
Steele vs. Halligan, 229 Federal Reporter 1011.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 12, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Probate Judge may not legally be employed by commissioners' court as hard labor agent for county.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of July 2, 1929, in which you enclose a letter from Hon. W. L. Lee, Jr., Examiner of Accounts, in which said Examiner states that the Board of Revenue or Court of County Commissioners of Bibb County, has appointed W. L. Pratt, who is a member of the Court of County Commissioners or Board of Revenue, as hard labor agent, and is paying him a salary on account of said employment. Said payment is made from the general fund of the county.

You request my opinion:

1. Is such an expenditure legal?

2. Could the Probate Judge, being a member of the Commissioners' Court or Board of Revenue, be a party to a contract made by the Commissioners' Court or Board of Revenue, or could the Commissioners' Court contract legally with a member of said Board?

In answer to your first question, I advise you that such an expenditure is not legal.

In answer to your second question, I advise you that neither a probate judge nor an individual member of the court of county commissioners may legally contract with the governing body of the county.

Section 5024, Code of Alabama, 1923, reads as follows:

"5024. County officer interested in county contracts.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue or any other state or county officer who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for use of prisoners or paupers."

Report of Attorney General, 1918-20, p. 54.

Biennial Report of Attorney General, 1926-28, p. 39.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 12, 1929.

Hon. J. H. Webb,
County Attorney,
Mobile, Alabama.

Act. No. 428, approved August 30th, 1927, (Acts 1927, p. 492) is valid when properly construed.

Opinion of Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of July 25th is acknowledged.

You wish my opinion as to the construction and validity of Act No. 428, approved August 30th, 1927, (Acts 1927, p. 492) amending Section 7489, of Code of 1923. This Act reads as follows:

The amount of compensation to which the owners and other parties interested therein are entitled must not be reduced or diminished because of any incidental benefits which may accrue to them, or to their remaining lands in consequence of the uses to which the lands to be taken, or in which the easement is to be acquired will be appropriated; Provided that in the condemnation of lands for ways and rights of ways for public highways, the commissioners may, in fixing the amount of compensation to be awarded the owner for lands taken for this use, take into consideration the value of the enhancement to the remaining lands of each owner that such highway may cause."

This Act is the same as Section 7489 of the Code down to the proviso. As I understand your letter, you wish my opinion as to whether or not the proviso renders said Act unconstitutional. Does its provisions contravene Section 235 of the Constitution? Section 235 of the Constitution of Alabama provides:

"Municipal and other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction."

Where a statute is susceptible of two constructions,—one of which makes the statute constitutional and other makes the statute unconstitutional,—the former will be adopted even though it be the less natural.—*Quarterbaum v. The State*, 79 Ala. 1; *Commissioners Court of Colbert County v. Street*, 116 Ala. bottom of p. 35.

It will be noticed that it is provided "that in the condemnation of lands for ways and rights of ways for public highways, the commissioners **may**, in fixing the amount of compensation to be awarded the owner for lands taken for this use, take into consideration the value of the enhancement to the remaining lands of such owner that such highway may cause."

Where a right of way through lands of a person is condemned for construction of a public highway, the compensation to which such person is entitled includes not only the market value of the lands taken, but damages done to the lands of which such right of way formed a part.—*Commissioners Court v. Bowie*, 34 Ala. 461; *Jones' case*, 70 Ala. 227; *Commissioners Court of Colbert County v. Street*, 116 Ala. 35. In my opinion, the fair market value of the lands actually taken must be paid for. To construe said proviso as authorizing the taking of land for right of way for public highway without any compensation other than the enhancement to the lands of which it formed a **part**, would, in my opinion, **make** the statute unconstitutional.

When the question of damages to the remainder of the lands of which it formed a part is considered, then, in my opinion, the commissioners "may" and should take into consideration the value of any enhancement to such remaining lands of such owner that such highway may cause. There may be,

and frequently are, elements of actual damage to the remaining lands, as well as incidental benefits, by the construction of a public highway. Compensation for such elements of damage may be effected by the enhancement in value of, or incidental benefits to, such remaining lands by the construction of the highway. In other words, if the remaining lands of such owner are as valuable, on fair open market, after the taking of the right of way as they were before the taking, the commissioners need allow no compensation for any element of damage thereto.

But for the amendment to Section 7489 of the Code, it is, in my opinion, doubtful if incidental benefits could be considered for any purpose in fixing compensation.

It will be noticed that the amendment provides that the commissioners "may." This, in my opinion, means may, where to do so does not conflict with provisions of the Constitution. There is a legitimate field of operation for the word "may." Section 7489 of the Code was, in my opinion, so amended, in order to modify, as far as permissible, with reference to rights of way for public highways, what is said, in said section, about compensation in general for taking lands for public purposes. Said section, before amendment, allowed no consideration, for any purpose, of incidental benefits.

A consideration of Section 7488 of the Code will make my meaning clearer. This section reads as follows:

"The Commissioners thus appointed, or a majority of them, shall assess separately the damages and compensation to which the several owners and other parties interested in each of the several tracts of land are entitled, and they shall be sworn as jurors are sworn. The Commissioners may view the lands to be subjected, and must receive all legal evidence offered by any party touching the amount of damages the owners of the lands and other parties interested therein will sustain and the amount of compensation they are entitled to receive."

From the foregoing it is clear that the statute, as a whole, provides the way of ascertaining the compensation to be paid the owner; which compensation includes the fair market value of the lands taken together with incidental damages to other lands of the owner. Except in the case of taking lands for rights of way for highways, incidental benefits which may accrue to the owner, or to the remaining lands of the owner, cannot be considered in reducing the compensation due for damages to other lands as the result of taking the lands for the public use. The value of lands taken, to the owner, of course cannot be affected by the use to which it is to be put, but the value of his remaining lands may be materially affected. If the incidental benefits are of value equal to the incidental damages, then the owner is not damaged in this respect. The benefits may entirely or partially offset the damages.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 12, 1929.

The Clerk of the Circuit Court,
Greenville, Butler County, Alabama.

Court costs—in criminal prosecutions for doing business without license.

License Inspector's fees in criminal prosecution for doing business without license.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of June 19, 1929. You state that on June 17, 1929, there was a conviction under Section 366, p. 442, General Acts, 1919, for "operating a restaurant without first having obtained a license to do so as required by law." The defendant in said case was convicted and fined \$15.00 besides the cost. After said defendant failed to pay or confess judgment for the fine and costs, he was sentenced by the court to hard labor to pay said fine and costs. You request my opinion:

1. In taxing up the costs in such a case should the Clerk of the Circuit Court tax, as a part of the cost, the license of \$7.50, Probate Judge fee for issuing the license, license inspector's commission and fee for serving citation, in addition to all regular costs in such cases, and require said defendant to work out this additional cost at seventy-five cents per day?

2. On a conviction under said section, for kindred offenses, should the Clerk of the Circuit Court pay to the license inspector, fifteen per cent of the penalty assessed against him?

In answer to your first question, I advise you that when a defendant is convicted of the offense of doing business without a license, the penalty and costs should be imposed and collected in strict compliance with Section 5424, Code of Alabama, 1923, which is as follows:

"Section 5424. Engaging in or carrying on business without license. —Any person, firm or corporation who shall engage in or carry on any business or do any act for which a license is required by law, without having first paid for and taken out a license therefor, in the manner provided by law, shall, on conviction, be fined not less than the amounts of all licenses required of him, and if convicted for refusing to take out the license, shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than one hundred dollars in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and when collected, two-thirds shall be paid to the state, and one-third to the county."

Said section being penal, calls for a strict construction.

Section 366 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 446), provides among other things, that a license inspector shall "scrutinize the records and stubs kept in the office of the Judge of Probate, and if it shall be reported to any license inspector, or come to his knowledge that any person, persons, firms or corporations have failed or refused to take out licenses as required by law, the license inspector shall report the same in writing to the Probate Judge, who shall forthwith cite such delinquent to appear before him and take out such license, but such Probate Judge shall not have authority to determine the liability of such delinquent for such license, but shall, in such case, issue a license to the applicant therefor upon the payment by him of the amount or amounts prescribed in this Act. If such delinquent shall fail or refuse to take out license, the license inspector shall institute, or cause to be instituted criminal proceedings against such delinquent, before any court having jurisdiction of such offense. In case of emergency the license inspector must commence the criminal proceedings in the first place. For performing the duties required by this Section, the license inspectors are entitled for each case so brought before the Probate Judge to be paid by the delinquent, in addition to the license, fifteen per cent of the amount of the license so collected, from each delinquent, which must be paid in all cases if report of delinquency has been made to the Judge of Probate of such delinquency."

The license inspector is not legally entitled to the fifteen per cent penalty, unless and until he fully complies with the provisions of Section 366 of the Act approved Sept. 15, 1919, (General Acts 1919, p. 442), that is to say, it is incumbent upon the license inspector to show that he has issued citation to the delinquent in a legal way and shall do all things which the law provides for him to do in such cases.

After a delinquent is cited by the license inspector and a criminal prosecution is instituted, said license inspector shall be paid fifteen per cent of the penalty provided for in such cases, which is to say, when said penalty is collected by the clerk of the circuit court it is his duty to pay to the license inspector fifteen per cent of the total penalty as provided in said Section 366, supra. Said item of fifteen per cent is not a part of the costs in such a case, but it is a part of the penalty. After deducting the license inspector's fifteen per cent, the Clerk of the Circuit Court should pay two-thirds of the balance to the State, and one-third thereof to the County, in conformity with Section 5424, Code of Alabama, 1923.

The foregoing also disposes of your second question.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 12, 1929.

Hon. W. B. Allgood,
State Treasurer,
CAPITOL.

The legislative purpose of subdivision (14) of Section 17 of Act No. 584, approved September 7, 1927 (General Acts, 1927, p. 686) is to provide for payment of interest on obligations of the State incurred for current expenses of administration in anticipation of collection, from sources already provided by law, of revenue for current fiscal year.

Opinion by Assistant Attorney General Evans.

Dear Sir:

You state that it will be necessary for the State Treasurer to certify warrants for the purpose of meeting the State's current obligations, and you ask my opinion as to the meaning and legislative purpose of subdivision (14) of Section 17 of Act No. 584, approved September 7, 1927 (Acts 1927, p. 686).

This subdivision of the Act mentioned provides as follows:

"For the Governor's interest contingent fund one hundred thousand dollars for every year."

In the administration of the State government it sometimes happens that expenses must be incurred in anticipation of collection, from sources already provided for by law, of revenue for the current fiscal year, to be paid out of such revenue when collected. This one hundred thousand dollars a year was intended by the Legislature to pay the interest on debts so incurred. Such obligations are valid and do not constitute any part of the debt limit provided by the Constitution.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 12, 1929.

The Circuit Solicitor,
Montgomery, Montgomery County, Alabama.

Board of Revenue has no legal authority to furnish Alabama Code of 1928 Annotated, to circuit solicitor.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of July 30, 1929, in which you request my opinion:

"Has the Board of Revenue of Montgomery County, Alabama, the legal authority to purchase for my official use as solicitor of the county, a copy of the volume: ALABAMA CODE OF 1928, Annotated, pub-

lished by the Michie Company, of Charlottesville, Va., 1929?"

Answering your question I am of opinion, that the Board of Revenue of Montgomery County has no legal authority to furnish the circuit solicitor with a copy of the volume known as the Alabama Code of 1928 Annotated. The authority for furnishing sets of the Code of Alabama to the various public officers is found in Sections 13 and 14 of an Act approved August 17, 1923, (Acts 1923, p. 131, 132). That part of Section 13 which is pertinent to your inquiry reads as follows:

"It is the duty of the secretary of the commission to transmit* * * * to every sheriff, solicitor, deputy solicitor, * * * one set. The title to all of which sets shall forever remain in the State of Alabama, and shall never become the personal property of any person or corporation however long they have had possession thereof."

There is, however, additional authority for the Secretary of State to furnish judicial officers additional copies of the Code where they have been destroyed without fault on their part, or on the part of their predecessor in office. This authority is found in Section 795 of the Code of Alabama, 1923.

The Alabama Code of 1928 Annotated is not an official Code, and is not supplied to the various public officers. I know of no provision of law which authorizes the Board of Revenue of Montgomery County to furnish you with a copy of the Alabama Code of 1928 Annotated. If you have in mind any general provision of law which would authorize the Board of Revenue to furnish you with the Alabama Code of 1928 Annotated, I would be glad to have you refer me to the section of the Code or Act, or to any decision of our Supreme Court covering the point."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 20, 1929.

Hon. R. E. Tidwell,
Superintendent of Education,
CAPITOL.

Schools—Payment of funds to county high schools.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of August 2, 1929.

You request my opinion:

Can the county high school funds amounting to \$4,500.00 for each county be paid to counties whose county high schools do not meet requirements for accreditation approved by the State Board of Education?

In my opinion the above question must be answered in the negative.

Section 460, School Code of 1927, provides that the requirements for accreditation of high schools shall be approved and printed by the State Board of Education.

Section 463, School Code of 1927, provides that the State Board of Education shall have authority to locate one county high school in each of the counties of the State, which shall comply with the minimum requirements prescribed by said Board.

Section 468, School Code of 1927, provides for certain appropriations to county high schools.

The above sections clearly show that county high schools shall possess certain qualifications which are prescribed by the State Board of Education. After carefully considering said sections it is my opinion that county high schools are not entitled to be paid county high school funds unless they possess the qualifications prescribed by the State Board of Education.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 21, 1929.

The County Engineer,
Athens, Limestone County, Alabama.

Roads: County may bear expense of installing or replacing culverts or bridges in or over side ditches of county road.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of August 1, 1929, in which you state that side ditches are essential for the drainage of the roads and as agent of the county you are continually called upon to fix entrances to homes and private property, as well as to roads that are not shown by the county records to be county roads.

You request my opinion:

"May I, as County Engineer and Superintendent of County Roads and Bridges, expend money or furnish material for installing or replacing culverts or bridges in side ditches of the county road for private entrances into private roads or other private property. In other words can expenditure of public funds be legally made for private purposes or where the same is not public and for the use of the masses."

The answer to your question is in the affirmative. I am of opinion that county funds may be expended for installing or replacing culverts or bridges in or over side ditches of county roads for private entrances into private

roads or other private property, provided these culverts or bridges are necessary in carrying out the plans and specifications for the road, and are necessary for preserving the integrity of said road.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 21, 1929.

State Tax Commission,
CAPITOL.

Under the provisions of Section 44 to 52, both inclusive, of Act No. 163, approved July 22, 1927, only one recordation of a list of securities is required.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of June 28th is acknowledged.

You ask for a re-consideration of my opinion of March 1st, 1928, in which it was held that under the provisions of Sections 44 to 52, both inclusive, of Act No. 163, approved July 22, 1927, (Acts 1927, p. 174 et seq.), an annual recordation of lists of the securities mentioned in said sections was required.

In reply will say that after a careful study of said sections I find no provision specifically requiring a second recordation. Furthermore, Section 52 provides:

"In the event the securities hereinbefore mentioned are not listed as herein provided with the State Tax Commission, same shall become liable for state, county and municipal taxes."

The foregoing clearly implies that where any such security has once been listed as provided in said Act, it shall not thereafter be a subject of taxation.

The latter part of subdivision (d) of Section 51 reads as follows:

"and such listing and payment shall on and after the date thereof be a bar to any legal proceedings by or on behalf of the State or any county or municipality of the State for enforcement or collection of any escape taxes on account of the security included in such tax list."

In Section 46, we find the following:

"The State Tax Commission, upon making the record of any such list of securities, shall certify on the same when it was received and recorded and in what book and page the same is recorded, and shall deliver the original of such list so certified to the party entitled thereto, or

his order, on the payment of the fees for recording the same, but the secretary may refuse to endorse 'filed' on any such list of securities or to record the same until his fees for the recording thereof are paid, and shall make such rules and regulations as it may deem necessary to carry out the provisions of this Act."

It thus appears that when a list of securities, or a security, has once been recorded as provided by said Act, each security on the list is ever thereafter free from all charges for taxes present, past and future, so long as said Act shall remain the law.

The Supreme Court of Alabama, in the case of Alonzo H. Lee v. State Tax Commission, in an opinion handed down on June 6th, 1929, held this law to be valid and constitutional.

Statutes with reference to taxation are construed most strongly against the State.

The said opinion of March 1st, 1929, is hereby overruled.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 21, 1929.

Alabama Real Estate Commission,
CAPITOL.

Real Estate Broker—If unlicensed he cannot maintain action for commission for sale of real estate.

Opinion by Assistant Attorney General Koonce.

Gentlemen:

I have your letter of July 31, 1929. You state that the law creating the Alabama Real Estate Commission requires real estate brokers to procure a license from said commission.

You request my opinion:

If a real estate broker fails to procure a brokers license from the Alabama Real Estate Commission can he recover a Commission for the sale of property?

In my opinion if a broker fails to procure a brokers license he cannot recover a commission for the sale of property. However, in my opinion, this matter is not one for the consideration of the Alabama Real Estate Commission, unless it is brought before the Commission in connection with application for license or for the purpose of obtaining information which will show that the broker violated the law in transacting business without a brokers license.

The Act approved August 27, 1927 (General Acts 1927, page 335), was enacted for the purpose of regulating and licensing real estate brokers and real estate salesmen. Section 12 of said Act imposes a penalty for the violation of its provisions. The provisions of the Act clearly show that it was not passed as a revenue measure but as a regulation for the protection of the public.

If the requisition of a license is for revenue only and not for police protection, the penalty for operating or acting without a license is visited upon the person and not upon the business, and contracts made in carrying on the business are not held void unless the statute expressly prohibits or vitiates them.

Sunflower Lbr. Co. v. Turner, 48 So. 510.

Morgan v. Whatley and Whatly, et al, 87 So. 846.

After reading the opinions of the court in the cases, supra, it is my opinion that an unlicensed real estate broker cannot maintain an action for a commission for the sale of real estate.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 22, 1929.

The Treasurer,
Clanton, Chilton County, Ala.

County Treasurer—liable on bond for illegal payment of county money.

Opinion by Assistant Attorney General Smith.

Dear Madam:

I have your letter of August 13, 1929, in which you request the opinion of the Attorney General on the following question of law:

1. Whether or not illegal warrants issued by the Probate Judge by order of the Commissioners Court are chargeable to the county treasurer if paid by said treasurer?
2. Am I, as county treasurer, required to register warrants issued by the probate judge, whether legal or illegal, and if so, who is the proper custodian after they are issued?

In answer to your first question, I am of the opinion that should you as county treasurer pay a warrant illegally issued by order of the court of county commissioners signed by the probate judge, you would be liable on your official bond.

Under the laws of Alabama governing county treasurers, it is the duty of a county treasurer to refuse to pay a claim, although such claim had been

audited and allowed by the county commissioners if the claim was not properly chargeable to the county, and if the treasurer pays such claim, he does so at his peril, and the fact that the claim had been audited and allowed by the commissioners would not be a protection to the treasurer if either upon the face of the claim, or upon the face of the record, of the court of county commissioners or otherwise, evidence was brought home to the county treasurer that the claim was in fact invalid although it had been allowed by the court of county commissioners.

Mobile County v. Williams, 61 So. Rep. 963.

In answer to your second question, I am of the opinion that when a claim against the county has been audited and allowed by the county commissioners and warrant issued, you should register same, but if the warrant so issued is illegal, you should not pay same. The person to whom a warrant is issued by the probate judge at the instance of the court of county commissioners, should be registered and retained by him until paid. When it is paid, the treasurer should receive said warrant and mark same paid.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 22, 1929.

The Judge of Probate,
Jasper, Walker County, Ala.

License—Wholesale soft drinks.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of August 3, 1929, in which you state as follows:

"Mr. J. H. Wall of Jasper, wishes to engage in the business of a wholesaler of soft drinks and he plans to have a warehouse two miles from the City of Jasper, where he will store bottled drinks and deliver same to different towns and communities in Walker County by truck."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Under Schedule 183, (Acts 1919, p. 282) will he be required to have separate State and County license for each town he enters?

I am of the opinion that Mr. J. H. Wall will not be required to have separate State and County license for each town he enters.

I am of the opinion that Mr. Wall will be required to pay a State license of \$50 under Schedule 185 (Acts 1919, p. 282), and in addition will have to pay license to the county of fifty per cent of the State license in accordance

with Section 262 of the Revenue Act of 1919 (Acts 1919, p. 440). Said Section reads as follows:

"SECTION 362. There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm, or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

The payment of the above amount of license is all that is required of a wholesaler of soft drinks for doing business in Walker County.

Attorney General's Report Vol. 3, p. 18 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 22, 1929.

The Judge of Probate,
Scottsboro, Jackson County, Alabama.

Courts of County Commissioners: Have no authority to pay for supplies purchased by individual member without authority from the Commissioners Court, unless afterwards ratified by said Court.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of August 14, 1929, in which you request the opinion of the Attorney General on the following question of law:

Has a member of the Court of County Commissioners acting individually and without an order of the Commissioners Court, a legal right to order tools or other supplies and have them charged to the county, without an order previously made and entered upon the minutes of the Court?

I am of the opinion that the county would not be liable for supplies purchased by an individual member of the Court of County Commissioners not having authority from the Court of County Commissioners, but in the event a member of the Court should purchase supplies for the county, and such supplies were used by the county for county purposes, in that event the Court of County Commissioners could ratify the unauthorized purchase by the member of the Court of County Commissioners.

Mobile County v. Maddox, 95 Ala. p. 336,
Opinion of Attorney General, September 19, 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 23, 1929.

The Judge of Probate,
Linden, Marengo County, Alabama.

License—Delinquents—citations for.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of August 16, 1929, relative to citation by license inspector.

You request my opinion:

Is the license inspector entitled to a fee of fifteen per cent where a person who has gone to the Tax Assessor for the purpose of assessing his automobile for ad valorem taxes, and the Assessor or other person notifies the license inspector and the citation is served under such a state of facts?

In answer to your question I am of the opinion that before the license inspector is entitled to the fee of fifteen per cent he must report the fact of such delinquency to the Judge of Probate.

Biennial Report of Attorney General, 1926-28, pp. 49, 53, 196, 375, 586.

Opinions of Attorney General, Book 8 (office edition) p. 141.

The law contemplates that citation fees and penalties shall not be collected unless the person in default is actually cited and the Judge of Probate notified of the delinquency of such person.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 23, 1929.

The Sheriff,
Abbeville, Henry County, Ala.

Prisoners—Removal of from county to county within State and from another State.

Costs in removing prisoners.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of January 3, 1929.

You request my opinion:

1. Who pays the cost of removing a prisoner from another state to the State of Alabama?

2. Who pays the cost of removing a prisoner from one county to another within the State?

In answer to your first question, I advise you that the State pays the cost of returning an absconding felon only after conviction.

See Section 3742, Code of Alabama, 1923,
Opinions Attorney General, 1929 Vol. 13, p. 35 (Office Edition).

In answer to your second question, I advise you that the county to which the prisoner is removed for trial is legally liable for the cost of such removal. Where there is a legal removal order and where the prisoner is charged with the commission of a misdemeanor. Said cost should be paid from the fine and forfeiture fund of the county.

Sections 3741, 3742 et seq. Code of Alabama, 1923;
Opinions Attorney General, 1929, Vol. 13, p. 35 (Office Edition);
Opinions Attorney General, 1929, Vol. 11, p. 107 (Office Edition);
Opinions of Attorney General, 1929, Vol. 13, p. 178 (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 23, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Funds derived from collection of inspection fee provided for by Section 173 of the Agricultural Code, 1927, and of inspection fee provided for by Section 197 of said Code; and of filing fee provided for by Section 390 of said Code, can each be used only for purpose specified in such sections respectively.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of August 7th is acknowledged. You request my opinion as to the following:

1st. For what purpose or purposes can the funds derived from collection of inspection fee provided for by Section 173 of the Agricultural Code of Alabama, 1927, be used?

2nd. For what purpose or purposes can the funds derived from the collection of the inspection fee provided by Section 197 of the Agricultural Code of Alabama, 1927, be used?

3rd. For what purpose or purposes can the fund, derived from the collection of the filing fee of five dollars provided for under Section 390 of the Agricultural Code of Alabama, 1927, be used?

In answer to your first inquiry will say that Section 175 of said Code directs the use to which the funds derived from collection of the inspection fee provided for by Section 173 shall be put. It provides: "To be used in paying the expenses of testing and analyzing said oils and defraying other expenses incident to enforcing the provisions of this Article." The Article is Article Nineteen of said Agricultural Code relating to kerosene and other illuminating oils, covering 170 to 176, both inclusive, of said Code.

In answer to your second inquiry, will say that the use to which the funds derived from the collection of the inspection fee provided for by Section 197 of the Agricultural Code of Alabama, 1927, shall be put is named in said Section, as follows:

"For the purposes of defraying the expenses of enforcing the provisions of this Article, the commissioner shall collect an inspection fee of one cent on each gallon of paint sold in Alabama, the payment to be made by the person first selling such paint in the State."

That clearly means for enforcing the provisions of Article Twenty-One in regard to white lead or paint, linseed oil and turpentine.

In answer to your third question will say that use to which the funds derived from collection of filing fee provided for by Section 390 of said Agricultural Code must be put is provided by said Section 390. That part of said section reads as follows:

"A filing fee of \$5.00 shall accompany said application, which shall accrue to the credit of the Agricultural Fund, to be used in defraying the expenses of executing the provisions of this article."

Here again the use to which such fund shall be put is clearly indicated. This fund must be used for defraying the expenses of executing the provisions of Article Thirty Four of said Code in regard to public warehouses.

It is my opinion that neither of the foregoing funds can legally be used for any purpose other than that specified. I find no intimation of a different legislative intent anywhere.

The provision in each of the sections as to use of funds derived from inspection fees, was doubtless made in recognition of the fact that the uses named were the only legitimate uses for which an inspection fee could be charged for inspecting articles in interstate commerce. The inspection provided for covers articles in interstate commerce as well as in intrastate commerce. Inspection fees on articles in interstate commerce cannot be made a cloak for collecting revenue for general purposes.

By Section 484 of said Agricultural Code it is provided:

"Wherever provision is made in this Code for the collection of any fee or license without providing for the disposition of the proceeds derived therefrom, such proceeds shall accrue to the Agricultural fund."

This section clearly implies that where provision is made for the dispo-

sition of proceeds derived from the collection of any fee or license, it does not accrue to the Agricultural Fund, but must be disposed of as provided.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 27, 1929.

The Judge of Probate,
Jasper, Walker County, Alabama.

Condemnation proceedings—Right of way for mining corporation.
Approval of Alabama Public Service Commission must be obtained.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of August 20, 1929, in which you submit the following statement of facts:

"The Bell Coal Company is purely a private corporation. It owns forty or eighty acres of coal land. Between where this land lies and the side track of the railroad is forty acres of surface land owned by a third party. This coal company desires to obtain a right of way over the lands of the third party to the side track. The coal company is purely a private mining corporation, mining its coal and selling it commercially, and is in no sense a public service corporation or a quasi public service corporation."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Whether or not a corporation such as described in the above statement of facts, has a right to file condemnation proceedings in the probate court to condemn a right of way across the forty acres of land to reach the side track, without first obtaining the permission of the Alabama Public Service Commission?

I am of the opinion that the corporation you describe, is a mining corporation engaged in the coal mining business, and comes within the influence of Section 7019, Code of Alabama, 1923, which is as follows:

"7019. Mining, Manufacturing, and Quarrying Corporations, May Acquire or Condemn Rights of Way, Tunnels, Sub-Ways, etc. Mining, manufacturing, power and quarrying companies may acquire by condemnation lands for ways and rights of way for railways, tramways, lines transmitting electric current together with the right to cut down such trees as might, by falling injure the same; except such as may be within the curtilage of his residence, canals, aqueducts, tunnels, underground passages, and roads whereby to connect any part of their lands, or works, with their principal place of business, or with any public road, railroad,

or navigable waters, or with their mines on other lands, not exceeding one hundred feet in width throughout the lengths of such railways, tramways, canals, aqueducts, tunnels, underground passages, transmission lines, or roads; and may acquire by condemnation lands on the bank of or adjoining any navigable waters, not exceeding in area ten acres, for the erection of public wharves, piers, or landings, and warehouses, depots, storage, loading or unloading places, and may acquire by condemnation the right to use any part of said ways, or rights of way for tipples and hoist houses for the purpose of loading and unloading coal, ore, stone, gravel, and other material on any such railway or tramway.

"Only a reasonable toll or charge, to be fixed by the Public Service Commission of Alabama, shall be made for the use of such public wharves, piers or landings, and warehouses, depots, storage, loading or unloading places. No proceedings for the condemnation of lands under this section shall be entered under this section until the approval of the public service commission is first obtained. No action can be instituted under the provisions of this section for the condemnation of any lands within the curtilage of any private residence."

The Supreme Court of Alabama has decided that this Section of the Code is a constitutional and valid law.

The Supreme Court of Alabama in the case of Sloss-Sheffield Steel and Iron Company v. O'Rear, holds that if the appellee had been a corporation that he would have come under the influence of Section 7019 of the Code, *supra*, and that said statute only applied to corporations.

Sloss-Sheffield Steel & Iron Co., v. O'Rear, 76 So. 57.

I, therefore, conclude that "The Bell Coal Company" being a corporation engaged in the mining business and desiring to condemn a right of way in connection with its mining business, will have to obtain a permit from the Alabama Public Service Commission as a condition precedent to condemning said property in the probate court.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 27, 1929.

Clerk of the Circuit Court,
Bessemer Division,
Bessemer, Jefferson County, Alabama.

Deputy Register of the Bessemer Division of the Circuit Court of Jefferson County not entitled to retain, as compensation, fees allowed registers of the Circuit Court; but must pay over such fees, when collected into the county treasury.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of September 28, 1928. You desire my opinion as to whether or not the Register, or acting Register, of the Bessemer Division of the Circuit Court of Jefferson County has the right to retain as compensation for his services the fees allowed by law to Registers in Chancery.

You state that you were appointed as Deputy Clerk and Register on September 21, 1927, by the Judge of the Bessemer Division of the Circuit Court of Jefferson County, to succeed E. C. Himes, deceased, and have been performing the duties of Register of said Court, although commission was issued to you as Deputy Clerk only.

When you say that you were appointed as Deputy Clerk and Register, you mean Deputy Clerk and Deputy Register, as I presume the Register of the Circuit Court of Jefferson County has his office in Birmingham.

I, therefore, presume that you wish my opinion as to whether or not you, as Deputy Register, have a right to retain as compensation for services rendered, as Deputy Register, the fees allowed by law to Registers in Chancery.

In reply will say that, in my opinion, you have no right to retain such fees. On the other hand, you should pay over such fees, when collected, to the County Treasury.

You state that "no provision is made by law or otherwise for compensation of the Register of this Court since the officers of this County have been put upon a salary basis."

If I understand the situation, there is neither Clerk nor Register of the Bessemer Division of the Circuit Court of Jefferson County, but only Deputy Clerk and Deputy Register. By Section One of Local Act No. 468, approved September 14, 1915 (Local Acts, 1915, p. 374, et seq.), compensation for Clerk and also of the Register of the Circuit Court of Jefferson County is provided for by salary. By Section 3 of said Act the following is provided:

"The Board of Revenue of Jefferson County is authorized and empowered to provide * * * deputies of said officers and to fix their compensation and to provide how they shall be paid; * * *. The compensa-

tion of the * * * deputies * * * affected by this bill to be fixed by the Board of Revenue; but the selection of such deputies * * * shall be left to the officers under whom they are employed, and said officers shall have the right to discharge said deputies at will."

The fact that by Act. No. 304, approved September 10, 1923, a salary of \$4,800.00 for Deputy Clerk of the Circuit Court of Jefferson County was provided for, does affect said Local Act of 1915, with reference to Deputy Registers of the Bessemer Division of the Circuit Court of Jefferson County.

By Section 2 of said Local Act it is provided:

"That when this act goes into effect, the costs, charges of courts, fees and commissions now authorized by law to be collected and retained by the several officers of Jefferson County above named, shall continue to be collected, but shall be paid into the County Treasury by the officer collecting the same, as other monies belonging to the County are paid."

It thus appears that all fees due the Register of the Circuit Court of Jefferson County, whether collected by himself or his Deputy, must be paid into the County Treasury.

An officer claiming fees must point to a definite law authorizing them and such law cannot be extended beyond its letter, as the State may impose duties on public officers without providing compensation therefor.

Mobile County vs. Williams, Judge, 180 Ala. 639.

You cite the following as authorities for your retaining the fees due Registers:

Waldrop vs. Henry, 207 Ala. 128,
McEldery vs. Abercrombie, 213 Ala. 289;
Tayloe vs. Davis, 212 Ala. 282.

None of these cases hold that an officer is entitled to retain any compensation except as provided by law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 27, 1929.

Hon. J. A. Bryan,
Justice of the Peace,
America, Walker County, Alabama.

Road Duty: Citizens who have performed road duty or who have been exempted in one county not subject to road duty in another county. Transients not subject to road duty.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of July 29, 1929, in which you state that there are a number of employees of Dixie Construction Company who have been living with their families—some in permanent houses and some in bunk houses of said county—for a period covering from six to twenty months and that these employees refused to pay road tax claiming that they are mere transients or sojourners. You further state that most of them are Alabama Citizens.

You request my opinion:

- (1) Are these employees subject to road duty and does it make a difference where these employees live?
- (2) Are those who are from Jefferson County and exempt in that County liable to road duty in Walker County?

The answer to the first question is dependent upon the fact of whether or not they have paid the tax or performed the road duty in any other County in the State which they claim as their residence. If these employees are Alabama citizens and have paid their poll taxes or performed road duty or have been exempted from road duty under Section 1354 of the Code of Alabama, 1923, in any other county in the State, they would not be liable for road duty in Walker County.

I am of the opinion that when a man has worked his full time required on the public highway of the county he claims as his residence or has paid the amount required in lieu of performing manual labor upon the road for the current year he would be exempt from further road service or payment of any road tax. The fact that some of the above mentioned employees live in permanent houses and some in bunk houses makes no difference. If some of these employees are non residents of Alabama claiming their citizenship in another State and are only temporarily in this State, they would not be required to pay the tax or perform the road duty.

The answer to your second question is in the negative. These employees who claim their citizenship in Jefferson County and who are exempt in that County are not liable to road duty in Walker County.

Report of Attorney General, 1926-28, p. 196.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 27, 1929.

The Superintendent of Education,
Linden, Marengo County, Alabama.

County Board of Education—not authorized to pay indebtedness
against school building not owned by State.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of July 23, 1929. You state that the town of Thomaston, Alabama, erected a brick building several years ago for an elementary school. You also state that a considerable sum of money was borrowed to construct the building and that \$9,500.00 is still unpaid, and that in addition to this indebtedness there are certain fire insurance premiums which are due and unpaid. You state that the title to the above building was and still is vested in the Town of Thomaston.

You request my opinion:

Can the special three mill district tax in Thomaston School District No. 43, or any part of it be used in liquidating the indebtedness against the Thomaston Grammar School Building and site, the title to which is vested in the town of Thomaston?

In my opinion the above special three mill district tax in Thomaston School District No. 43 cannot be used for the above purpose.

Local school monies raised for the support of public schools by taxation or otherwise are expended by the County Board of Education:

Section 250, School Code of 1927.

However, the above section does not authorize the County Board of Education to pay an indebtedness against a building not owned by it or by the State.

I rendered an opinion on February 23, 1927 (Vol. 1, Opinions Attorney General, 1926-1927, p. 256, office edition), in which I held that, in my opinion, the County Board of Education has no legal authority to use any part of the district tax in repairing and improving a building which is not owned by the County Board of Education or the State.

If the County Board of Education of Marengo County desires to pay off the indebtedness against the Thomaston School which you mention in your letter, the title to such property should be vested in the County Board of Education.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 28, 1929.

The State Treasurer,
CAPITOL.

When bond has been executed by one, as administrator of the estate of a deceased person, with a corporation having the power of authority, under its charter to become surety on such bond as provided by Section 2640 of the Code; and, in accordance with Section 2649 of the Code, the Superintendent of Insurance makes a written order upon the State Treasurer to sell as many of the bonds or other securities deposited by such corporation with the State Treasurer as may be necessary to pay such judgment or decree and the interest and costs thereon and to pay to the Clerk or Register of such Court, from the proceeds of such sale the amount of such judgment or decree, with interest and costs, it becomes the duty of the State Treasurer to comply with such order.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of June 24, 1929, is acknowledged. In reply thereto will say that I have carefully examined the written order made upon you of date June 18, 1929, by Hon. Geo. H. Thigpen, Superintendent of Insurance, to sell, as required by Section 2649 of the Code of Alabama, as many of the bonds or other securities deposited with you, as State Treasurer, by the United States Fidelity and Guaranty Company, as may be necessary to pay the balance due on decree against it as surety on the bond of W. I. Goolsby, as administrator of the estate of T. F. Goolsby, deceased. It is my opinion that this order is in compliance with the statute and that it is your duty to comply with it. I am herewith returning the order for your files.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 29, 1929.

Clerk of the Circuit Court,
Geneva, Geneva County, Alabama.

Clerk of Circuit Court—payment of money to persons entitled to same by reason of condemnation proceedings.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

Sometime ago you wrote me that the Town of Samson had condemned certain lands for school purposes, under authority of Sections 2295-2298, Code of Alabama, 1923. You state in your letter that the owners of some of the condemned lands are unknown. You also stated in your letter of July 25, 1929, to me that you recently paid \$900 to a minor child in Coffee County

and that such sum represented the child's interest in certain lands which had been condemned. You further stated that you doubted the sufficiency of the bond of the guardian.

You request my opinion:

If lands are condemned for school purposes under the authority conferred by Sections 2295-2298 of the Code of 1923, how shall the money for such lands be disbursed by the Circuit Clerk?

In my opinion, the money should be paid to the various owners by the Circuit Clerk, but the Clerk should not pay money to any person unless he is convinced that such person is entitled to receive the same. If the money is to be paid to the guardian of a minor child and the clerk is of the opinion that the bond is not sufficient to protect the interests of the child, he should not pay any money to the guardian until a new or additional bond has been given.

Section 8141, Code of Alabama, 1923, provides that the judge of probate has authority to require new or additional bonds of guardians.

Section 8146, Code of Alabama, 1923, provides that the judge of probate and the sureties on his official bond are liable to any person injured for any neglect or omission of the judge in not taking from a guardian a good and sufficient bond, etc.

If you believe that the bond of any guardian to whom you are to pay any sum of money, in connection with the performance of your duties as circuit clerk, is insufficient to protect the interests of his ward, you should bring the matter to the attention of the probate judge, so that he can require a new or additional bond if he deems such action necessary.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 30, 1929.

State Board of Health,
Montgomery, Alabama.

Traveling expenses of members of the State Board of Censors of the Alabama State Medical Association—when paid.

Opinion by Assistant Attorney General Rayburn.

Dear Sirs:

I have your letter of August 24, 1929. You request my opinion:

Are traveling and other expenses of the members of the State Board of Censors of the Alabama State Medical Association, acting in any one of its three capacities: (1) State Board of Censors, (2) State Committee of Public Health, (3) State Board of Medical Examiners, a legal charge

against the funds of the State Board of Health while attending: (1) regular meetings, (2) called meetings, (3) meetings while in attendance upon the annual meeting of the Alabama State Medical Association?

In answer to your inquiry, I advise you that members of the State Board of Censors of the Alabama Medical Association are legally entitled to be compensated only when said Board of Censors acts as the State Board of Medical Examiners. Section 2836, Code of Alabama, 1923, constitutes the Board of Censors of the Medical Association of the State of Alabama as a Board of Medical Examiners. Section 2869, Code of Alabama, 1923, reads as follows:

"After defraying all expenses of holding an examination, such as furnishing blanks, paper, postage, certificates, etc., the services of supervisors, clerical help, etc., the remaining funds shall be equally divided among the ten members of the State Board of Medical Examiners."

The compensation provided for in this Section is the only compensation allowed by law for the multitudinous duties of the members of the State Board of Censors.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 4, 1929.

The Highway Director,
State Highway Department,
CAPITOL.

Persons requesting certified copies of records in Highway Department for use as evidence in courts of the State of Alabama, are entitled to same on payment of all legal charges therefor.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 4th is acknowledged. You wish my opinion upon the following:

There are numerous damage suits being brought, and you are requested to furnish certified copies of records in your office to be used by plaintiffs as evidence. You wish my opinion as to your duty to furnish such certified copies, where requested.

In reply will say that, in my opinion it is your duty to do so upon payment of proper charges for making copy. Section 15 of the Highway Code, 1927, provides:

"The State Highway Commission shall keep on file in its office copies of all plans and specifications prepared by the State Highway

Department and the files and records of such Department shall, under reasonable regulations, be kept open for inspection by the public at all reasonable hours. Certified copies of records shall be received in evidence in all the courts of this State."

From the foregoing, it is, in my opinion, clearly implied that one having need of such copy for use as evidence in a court of this State is entitled thereto on payment of all legal charges therefor.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 5, 1929.

Judge of Probate,
Tuskegee, Macon County, Alabama.

Where mortgage is executed on real estate to secure payment of debt and mortgage recorded; and, subsequently, by contract between mortgagor and mortgagee, said real estate is conveyed by fee simple deed by the mortgagor to the mortgagee in payment of said mortgage debt, such deed, when offered for record, requires payment of filing tax under Section 21½ of Act No. 163, approved July 22, 1927. (Acts of 1927, p. 163.)

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of July 13, 1929, is acknowledged. You wish my opinion on the following:

A executes a mortgage to B on certain real estate to secure the payment of a certain indebtedness. The mortgage is duly recorded. After the mortgage debt falls due, in pursuance of a contract between the mortgagee and mortgagor, A conveys to B, by fee simple deed, the real estate covered by the mortgage, in full payment of the mortgage debt. B offers this deed for record in the probate office. Must a deed filing tax under Section 21½ of Act No. 163, approved July 22, 1927, be collected on filing such deed for record.

In reply will say that when a mortgage debt is thus paid, the mortgage is satisfied and the mortgagor is entitled, under Section 9023 of the Code, to have the mortgagee enter the fact of satisfaction on the margin of the record of the mortgage. Henceforth, the title of B is derived solely from the deed, and when this deed is offered for record, it is my opinion, that a deed filing tax must be collected, based on the value of the real estate which it purports to convey.

In the case of foreclosure at sale under the power given in the mortgage, where the mortgagee becomes purchaser, the mortgage remains the instrument of conveyance, and the sale simply cuts off the equity of redemption.

No conveyance is here necessary as the mortgage becomes absolute, subject only to the two years statutory right of redemption. A so called deed in such a case conveys nothing and operates as memorandum of sale only. Of course, a different rule obtains where a stranger buys in the land at the sale and deed is made to him under the power in the mortgage. There the title is conveyed by the deed to the stranger and a filing tax is due on offering such deed for record.

The tax provided for by Section 21½ of Act No. 163, approved July 22, 1927, (Acts 1927, p. 163) is on deeds which convey real estate or some interest in real estate. Where there is, as matter of law, no conveyance there is no tax under this provision.

Tax laws are construed most strongly against the State, where there are reasonable grounds for construction.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 9, 1929.

Mr. William Stoll,
City Attorney,
Russellville, Franklin County, Alabama.

A municipality in providing public parks or music or other exhibition in its public parks for the amusement of its inhabitants, is exempted from taking out license therefor by Schedule 5 of Section 361, Revenue Act 1919, (Acts 1919, p. 397).

Such parks and entertainments must be free and open to the inhabitants, when established and maintained by a municipality.

If a show or other entertainment, for which the law requires State and County license, is conducted on lands belonging to a municipality, by one other than the municipality the license required by law for State and County for such show or entertainment must be paid for by the one putting on or conducting such show or entertainment.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of August 23rd is acknowledged. You ask my opinion upon the following:

Would a municipality be required to pay a license, if it had a park commission which looks after its parks and operates same in letting transient shows, or other amusements, show in its park; and would such shows be liable to pay the license tax, or would such amusements be exempt under Schedule 8 of Section 334 of 1929 Compilation of Revenue Laws of Alabama.

In reply will say that the only authority that I have found given to municipalities with reference to parks is found in Section 2018 of the Code. This authority is as follows: to "establish, lay out and improve public grounds, parks and boulevards, regulate the same and may provide music and other exhibitions for the amusement of the inhabitants."

It is my opinion that such parks and such entertainments must be free and open to the inhabitants; that the municipality is without authority of law to maintain a park for entertainments that are charged for, or for hire to entertainers where charges are made.

If a show, or other entertainment, for which the law requires State and County license, is conducted on lands belonging to a municipality, by one other than the municipality, the license required for such show or entertainment must be paid for by the one putting on, or conducting, such show or entertainment. There is no exemption provided for in such case.

As to Schedule 8 of Section 334 of the Revenue Laws of Alabama, compiled 1929, it is my opinion that a municipality cannot legally be the owner and operator of an amusement park where charges are made to the inhabitants for amusement; nor of a park to be let for hire for such purpose. The park which a municipality may establish is the one provided for by Section 2018 of the Code. For providing music and other exhibitions for the amusement of the inhabitants by the municipality, no license is required; but such music and other exhibitions must, in my opinion, be open to the inhabitants, free of charge.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 10, 1929.

The Sheriff,
Ozark, Dale County, Alabama.

Witness fees in State cases.

Opinion by Assistant Attorney General Rayburn.

Dear Sir:

I have your letter of August 28, 1929. You state that a certain witness received a summons to appear in the Circuit Court of Dale County for the State in the case of the State v. Leonard Pelham. Said witness lives at Geneva, Alabama. In order for said witness to appear in the Circuit Court of Dale County in answer to said summons, it was necessary for him to ride the bus through Dothan, which caused said witness to travel sixty-one miles. The clerk of the circuit court only allowed said witness pay for forty miles.

You request my opinion:

Is said witness legally entitled to mileage for one hundred and twenty-two miles in addition to his attendance?

In answer to your inquiry, I advise you that said witness is entitled to mileage at the rate of five cents per mile for the one hundred and twenty-two miles traveled, in addition to his attendance, provided that the residence of said witness was Geneva, Alabama, and provided further that the route traveled through Dothan was the route usually traveled by those who come to Ozark, Alabama, from Geneva, Alabama.

Section 3762, Code of Alabama, 1923, provides that:

"Witnesses in criminal cases are entitled to one dollar per day and five cents for each mile to and from their residence by the route usually traveled and all necessary ferriages and toll."

Of course, circumstances might intervene which would make it necessary for a witness to make a circuitous route in arriving at the court to which he has been summoned. Said statute concerns only the usual route of travel, and does not treat of the distance traveled. That is to say the route usually traveled may be the longest way, and though it is the longest way, mileage should be paid from any point in the State of Alabama to the situs of the court from whence summons issued.

Scruggs v. State, 111 Ala. p. 60, 20 So. 642.

Report of Attorney General 1918-20, p. 59.

Nicholas v. Trickey, 19 Ala. 92, 94.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 11, 1929.

The Superintendent of Banks,
Banking Department,
CAPITOL.

1. In contemplation of Section 6338 of the Code a promissory note is to be regarded as security. Its sufficiency must be determined by the Board of Directors of the bank or the "committee."

2. A bank cannot make a loan to its salaried officer, agent, employee or director of more than 20% of its capital, surplus and undivided profits. If such loan is attempted, it is void as to the excess and such excess cannot be drawn from the bank and used without the commission of a misdemeanor or felony according to the facts of the case.

3. A loan cannot be made by a bank to one of its salaried officers, agents, employees or directors, without the applications therefor being first submitted to and approved by the Board of Directors of the Bank or the "Committee." For an officer, agent, employee or director to take money from the bank and convert it to his own use, he is guilty of embezzlement or of overdrawing his account.

When loans have been made by a bank to an individual, corporation or firm contrary to the provisions of Section 6339 of the Code, the duties of the Superintendent of Banks is prescribed in the latter part of said Section as follows:

"It shall be the duty of the superintendent of banks to order any loan in excess of the amount herein fixed reduced to the legal limit, or the excess charged to profit and loss, provided in his opinion such excess is not well secured, and if such reduction shall not be made within thirty days after such notification, to proceed as in other cases provided for violation of the orders of the superintendent."

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 7th is acknowledged. You ask my opinion upon the following:

1. When a bank makes loans to its officers, employees or directors, shall it, in every case, require security outside of the signature of the party?

2. In case a bank makes loans in excess of 20% of its capital, surplus and undivided profits to one of its officers, agents, employees or directors and such loan is duly approved in writing, does such loaning constitute a crime?

3. If an officer of a bank makes a loan to a salaried officer or agent or employee or director of the bank, without the loan being submitted to and approved by the board of directors of the bank or the committee, in writing and filed in the archives of the bank as provided by Section 6338 of the Code, does the officer of the bank making the loan commit a crime or misdemeanor?

4. If an officer of a bank makes a loan to any one person, firm or corporation of more than 20% of its capital, unimpaired surplus and undivided profits, does such officer making the loan commit a crime or misdemeanor?

5. If an officer of a bank makes a loan to a person, firm or corporation of more than 10% of its capital unimpaired surplus and undivided profits, but not over 20% thereof, without requiring good collateral or other ample security, and without the approval of such loan, in writing, by the Board of Directors as required by Section 6339 of the Code, does such officer making the loan commit a crime or misdemeanor in so doing?

In reply to question one, will say that a promissory note, in such a case, is deemed "security." Its sufficiency as security must be determined by the Board of Directors or the Committee, as provided by Section 6338 of the Code.

Opinion of Attorney General to Hon. D. F. Green of date Feb. 18, 1919 (Biennial Report of Attorney General, 1918-1920, p. 94, et seq).

In reply to question two, will say that in my opinion, a bank cannot make a loan to one of its salaried officers, agents, employees or directors of more than twenty per cent of its capital, surplus and undivided profits. If such loan is attempted, it is void as to the excess over twenty per cent. Such excess, in my opinion, is money belonging to the bank. If placed to the credit of such officer, agent, employee or director and checked out by him, he has, in contemplation of law, overdrawn his account and, if he knows the facts, he is guilty, under Section 3407 of the Code of a misdemeanor. Such excess cannot legally constitute part of his account. If such officer, agent, employee or director takes this excess from the bank and converts it to his own use, knowingly and intentionally, he is, in my opinion, guilty of embezzlement under the provisions of Section 3964 of the Code.

In reply to question three, will say that an officer of a bank cannot, as a matter of law, make a loan to its salaried officer, agent, employee or director, without the application for the loan being first submitted to, and approved by, the Board of Directors of the bank, or the Committee, as provided by Section 6338 of the Code and approved. Until this has been done, the loan has not been made, and there is no authority of law for taking the money from the bank. Such taking or handing over the money of the bank would, in my opinion, constitute a criminal offense according to the facts in the case.

In answer to questions four and five, will say that for a violation of Section 6339 of the Code, the duty of the superintendent of banks is set out in the last sentence of said section. This sentence reads as follows:

"It shall be the duty of the superintendent of banks to order any loan in excess of the amount herein fixed reduced to the legal limit, or the excess charged to profit and loss provided in his opinion such excess is not well secured, and if such reduction shall not be made within thirty days after such notification, to proceed as in other cases provided for violation of the orders of the superintendent."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 12, 1929.

The Judge of Probate,
Birmingham, Jefferson County, Alabama.

Where a person is appointed administrator of the estate of a deceased person, or guardian of the estate of a minor, the surety on his bond is liable only to the extent of assets of such estate.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of August 6, 1929, is acknowledged. You ask my opinion upon the following:

Where an administrator or guardian has been appointed by the probate court and bond given as provided by law, and nothing has been received by the administrator or guardian, and he has been unable, after due diligence, to locate or get possession of any property belonging to the estate or to the ward, can the surety on the bond be required to pay costs in probate court?

In reply will say that, in my opinion, the surety on the bond of an administrator or guardian is not liable beyond the assests of the estate of the deceased person or property belonging to the estate of the ward. The sole purpose of the bond is to protect those interested in the estate and the property of the ward. As said in the case of *Campbell v. American Bonding Co.*, 172 Ala. 458:

"the accountability of the administrator in his representative capacity is limited to assets of the estate of his decedent.—Ala. State Bank v. Glass, 7 Ala. 466; *Weeks v. Love*, 19 Ala. 25; 20 Ala. 354."

In such a case the administrator or guardian is doubtless liable in his individual capacity for costs created by him, but not in his representative capacity, as he is liable in his representative capacity only to the extent of the assets of the estate. As said in said case of *Campbell v. American Bonding Company*:

"the liability of the surety sued must, of course, depend upon the liability of the principal, the personal representative as such. If the liability of the administrator is individual, personal, the surety cannot be held, for his assurance is for the faithful performance of the administrators duties in his representative capacity alone."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 12, 1929.

The Judge of Probate,
Grove Hill, Clarke County, Alabama.

Section 20 of Act No. 163, approved July 22nd, 1927, (Acts 1927, p. 161) being partially inconsistent with Schedule 118 of Section 361 of Revenue Act No. 328, approved September 15, 1919 (Acts 1919 p. 402) repeals said Schedule 118 by implication to extent of such inconsistency.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 3rd, 1929, is acknowledged.

You ask my opinion upon the following:

In the compilation of the Revenue Laws of 1929, there is on page 226 thereof Schedule 15 of licenses and on page 263 thereof Schedule 79.

Each of these schedules provide for license on operating gasoline filling stations. You wish my opinion as to whether or not both these schedules are effective, or did the Revenue Act of 1927, in which said Schedule 79 occurs as Section 20 thereof, repeal said Schedule 15 which was Schedule 118 of Section 361 of the 1919 Revenue Act.

The 1929 Compilation of the Revenue Laws of the State of Alabama was gotten up merely for convenience by attempting to collect in one book all the revenue laws of the State. This compilation has not been adopted by the Legislature. It contains some provisions of law that are inconsistent. Said Schedule 15 is one of those contained therein that has been repealed in part by implication. Said Schedule 79, which is the same as Section 20 of Act No. 163, approved July 22, 1927 (Acts 1927, p. 161) repeals by implication, said Schedule 15, which is the same as Schedule 118 of Section 361 of Act No. 328, approved September 15, 1919 (Acts 1919, p. 402), so far as gasoline filling stations operated for profit are concerned. It does not repeal it as to gasoline filling stations operated not for profit, nor as to filling stations for motor power oil other than gasoline. As to gasoline filling stations operated not for profit and as to the operation of motor power oil filling stations other than gasoline, said Schedule 118 of the 1919 Act is still operative. Repeals by implication are not favored, and a subsequent statute operates a repeal of a former statute only so far as their provisions are repugnant.

Jackson v. State, 76 Ala. 26,

Kerr v. Seymour, 76 Ala. 270,

Roberts v. Pippin, 75 Ala. 103.

In the case under consideration, the subsequent Act covers only gasoline filling stations operated for profit. It does not cover gasoline filling stations not operated for profit, nor filling stations for motor power oil other than gasoline.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

September 13, 1929.

The Judge of Probate,
Girard, Russell County, Alabama.

Mailing a check to probate judge to pay recording fee on recording mortgage does not constitute payment of such fee unless received and so treated by the probate judge.

Probate judge no authority to cancel mortgage sent him for record. If he records before payment of recording fee, the party having the mortgage recorded is indebted to him for such fee.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of August 30th to hand. You write as follows:

"Please advise me whether or not I have the right to cancel several mortgages (crop) which were sent to me by the Secretary of Agriculture

for recordation, who claims that they mailed me a check for said fees, but have not been received by me."

In reply will say that the mailing of a check does not constitute payment.

I fear that I do not understand your question as to cancelling the mortgages. So far as I can guess, I should say that you have no right to cancel a mortgage that has been sent to you for record. Of course, you need not record a mortgage until the recording fee has been paid.

If you have recorded the mortgages and have not received payment therefor, they still owe you for the recording. If the check which is claimed to have been sent in has been cashed by anyone, this can easily be ascertained by them. It is senseless for them to contend that they mailed the check, if the check has not been cashed. Checks are mailed at the risk of those who mail them, and does not constitute payment unless received and so treated.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 14, 1929.

The Judge of Probate,
Dothan, Houston County, Alabama.

Taxation—Municipal Corporation—Municipal corporations when employed in private business not of a governmental nature are liable for deed and mortgage tax on lease sale contracts for the sale of electrical stoves and other electrical equipment, when lease sale contract is presented for record.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of July 19, 1929, in which you state as follows:

"The City of Dothan, Alabama, is engaged in the business of selling electrical ranges and other electrical equipment to the public and enters into written lease sale contracts with its customers for deferred payments due the City of Dothan, and have presented these written lease sale contracts for record in the office of the Judge of Probate".

Under this statement of facts you request the opinion of the Attorney General upon the following question of law:

Whether or not this office should collect a deed and mortgage tax on said instruments when presented for record as provided in Section 21½, Revenue Act, 1927, Acts, 1927, p. 163?

As a general proposition it is never presumed that a tax levied by the Legislature is intended to apply against the State or any of its governmental instrumentalities.

Attorney General's Report 1924-26, p. 289;
Attorney General's Report 1926-28, p. 705.

However, municipal corporations possess two kinds of powers, one governmental and public, and to the extent they are held and exercised, is clothed with the sovereignty; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government; and while in the exercise of the latter is a corporate legal individual.

Vilas v. Manila, 220 U. S. 356.

The Legislature may do nothing by taxation in any form to prevent the full discharge by the municipal corporation of its governmental functions, yet, **whenever a municipal corporation engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the State.**

South Carolina v. the United States, 199 U. S. 437.

I am, therefore, of the opinion that when the City of Dothan engages in the business of selling electric ranges and other electrical equipment to the public, it is not engaging in governmental functions, but is engaged in a business of a private nature, and that the business is not withdrawn from the **taxing power of the State.** I do not believe that the legislature even intended to exempt municipal corporations from taxation in the matter of carrying on a purely private business. The City of Dothan should pay the deed and mortgage tax on lease sale contracts made for the sale of electric ranges and electrical equipment when presented for record just the same as a private corporation or individual would do under Section 21½ of the Revenue Act of 1927.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

September 20, 1929.

Tax Collector,
Jasper, Walker County, Alabama.

Taxation—stockholders of corporation liable for taxes on property leased from city.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of recent date in which you submit the following statement of fact:

The Citizens Water Light and Power Co. of Carbon Hill, Alabama, leased certain property from the City of Carbon Hill, operated, assessed

and paid the taxes on the same for six or seven years and after it assessed this property for 1927, sold the lease back to the City of Carbon Hill and the City immediately sold the property to the Alabama Power Company, the sale being made about the 15th day of June, 1927, and that all parties involved refused to pay the taxes.

You request my opinion:

Who is liable for the taxes under the above statement of facts?

I am of the opinion that the stockholders of the Citizens Water, Light and Power Co. are liable for the taxes under the above statement of facts.

While it is true that all property, real and personal, of municipal corporations is exempt from ad valorem taxation, at the same time the Citizens Water Light and Power Company is liable for taxation on this lease. In other words, this company is liable for taxes on intangible property.

See Sections 2 and 77 of an Act approved August 22, 1923, Act, 1923, pp. 153 & 194.

Under the authority of *Adams vs. Perryman*, 202 Ala. 469, the stockholders of the Citizens Water Light and Power Company are personally liable for the taxes in this instance.

Report of Attorney General, 1926-28, p. 206.

Opinions of Attorney General, Vol. 7, p. 48, (Office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 20, 1929.

The State Treasurer,
CAPITOL.

Warrant issued under circumstances named in opinion below and payable as there stated, held to be legal and binding on the State.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Receipt of your letter of September 9, 1929, is acknowledged. You enclose with your letter Warrant No. 35599 for \$480,853.75, with Auditor's certificate thereto attached, payable January 13, 1930.

You state that it is necessary that this warrant to be hypothecated or discounted from the present date until January 13, 1930, for money to pay current expenses of the State government, when said warrant will be paid from the proceeds of taxes collected during said period for which there will be a sufficient amount available for the purpose.

You wish my opinion as to the legality of the warrant.

In reply will say that it is my opinion that the warrant so issued, to obtain, by discount, for the time of forbearance named by you, money to pay current expenses of the State to be repaid out of taxes collected during the current fiscal year, is entirely legal.

To meet such a contingency, by paying interest during the period of forbearance, the Legislature of Alabama, by subdivision 14 of Section 17 of Act No. 584, approved Sept. 7, 1927, (General Acts, 1927, p. 686) appropriated for the Governor's Interest Contingent Fund One Hundred Thousand Dollars for every year.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 21, 1929.

County Solicitor,
Heflin, Cleburne County, Alabama.

Board of Review—method of filing objections to assessed valuation.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of August 10, 1929. You state that a number of persons appeared before the Board of Review and protested the assessed valuation of their property but that they did not make their objections in writing. You also state that some of such persons have appealed by filing an appeal bond with the Clerk of the Circuit Court.

You request my opinion:

Did the failure of the above mentioned persons to file objections in writing deprive said persons of the right to appeal to the circuit court?

In my opinion the above question must be answered in the affirmative. I have examined the opinions of the Attorney General but do not find one on the question which you ask.

Section 56 of an Act approved August 22, 1923, (General Acts 1923, p. 181) provides that any taxpayer who is not satisfied with the valuations of his property as fixed and entered on the return list may file objections to such assessed valuations and that the taxpayer shall set out in such objections filed, the description of each item of property, etc.

Section 59 of the above Act provides for an appeal to the Circuit Court by a taxpayer, his agent or attorney.

You will observe that the above Section 56 of the Act approved August 22, 1923, provides for the filing in writing of objections to assessed valuations. Whether or not such provision is directory or mandatory is to be ascertained

from the provisions of the Act. If said provision is mandatory then it is prerequisite to the right to appeal to the Circuit Court.

There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the Act.

Citizens Bank and Security Co. vs. Commissioners Court of DeKalb County, 96 So. 778

Alabama Pine Co. vs. Merchants and Farmers Bank of Aliceville, 109 So. 358.

After considering the above sections of the Act approved August 22, 1923, and the opinions of the court in the above cited cases I am of the opinion that the requirement that objections to assessed valuations be made in writing is a mandatory provision and, therefore, that an appeal cannot be taken to the Circuit Court unless said objections are filed in writing with the Board of Review.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 23, 1929.

Superintendent of Education,
Fayette, Fayette County, Alabama.

County Board of Education—member cannot be employee of said Board.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of September 9, 1929. You refer to Section 87 of the School Code of 1927. You state that one of the members of the Fayette County Board of Education has a contract to transport children to school.

You request my opinion:

Can a member of the County Board of Education be employed to transport children to school?

In my opinion a member of the County Board of Education cannot be employed to transport children to school.

Section 87, School Code of 1927, provides that no member of the County Board of Education shall be an employee of said Board. Clearly, a member of a County Board of Education cannot be employed to transport children to school, without violating said Section 87.

I rendered an opinion on December 8, 1927, to the Superintendent of Education of Cherokee County (Biennial Report of Attorney General, 1926-

28, p. 386) in which I held that a member of a County Board of Education cannot be a school attendance officer.

Yours truly,
CHARLIE C. McCAL,
Attorney General.

September 23, 1929.

The County Superintendent of Education,
Ozark, Dale County, Alabama.

County Board of Education—meetings and payment of expenses of members.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of September 9, 1929, in which you refer to Section 92 of the School Code, 1927.

You request my opinion:

Can members of the County Board of Education be paid expenses incurred in attending more than twelve meetings a year?

In my opinion members of the County Board of Education cannot be paid expenses for attending more than twelve meetings in each year.

Section 92 of the School Code of 1927 provides that the members of the County Board of Education shall not be allowed pay for more than twelve days in any one year and this Section further provides that their expenses shall be paid in like manner as provided for the compensation of teachers. In my opinion this last provision as to payment relates to the manner of payment and does not mean that members can be paid expenses for attending more than twelve meetings in any one year.

I rendered an opinion on September 30, 1927, to the Superintendent of Education of Pike County (Biennial Report of Attorney General, 1926-28, p. 299) in which I held that it would be unlawful to pay a member of the County Board of Education per diem or traveling expenses for more than twelve board meetings within any one fiscal year.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 23, 1929.

The Judge of Probate,
Troy, Pike County, Alabama.

Courts of County Commissioners—When constitutional debt limit is reached appropriations out of current revenue that exceed the revenues are debts and absolutely void under the Constitution.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of August 7, 1929, in which you state as follows:

"Pike County is about \$200,000 in excess of its Constitutional Debt Limit at this time.

The current year's revenue has been pledged by budget and otherwise, to take care of the current year's expense.

The Court of County Commissioners has withdrawn the annual appropriation for the various county units, the appropriations for which were included in the 1929 budget, as follows:

County Health Unit.
Farm Demonstration Agent.
Home Demonstration Agent.
Child Welfare Agent.

These withdrawals became effective August 1, 1929."

Upon this statement of facts you request the opinion of the Attorney General on the following questions of law:

In the event the court of county commissioners should rescind their order and reinstate these appropriations, could I, as Probate Judge, legally draw warrants in payment of said appropriations?

I am of the opinion that when a county has reached its constitutional debt limit under Section 224 of the Constitution of Alabama, 1901, it cannot contract any further debt. It is then reduced to a "cash basis" and a policy of "pay as you go." In order that it may function as an arm of government, the law says that while it must live within its revenue for the current year, yet it may appropriate its tax revenues in anticipation. For this purpose the tax levy is by a fiction considered as in esse or on hand. In arriving at what is meant by living within the income of the current fiscal year, recourse should be had first to all those debts or obligations made obligatory upon a county, of an involuntary class, such as heating the jail, and those claims which are made preferred claims by Section 231 of the Code of Alabama, 1923. After all claims that are made obligatory upon a county are computed—or subtracted—the balance, if any, is the amount that the county commissioners are invested with discretion as to what purposes they will "appropriate" or set apart its revenues for during the current fiscal year.

Any amount of appropriations out of the current revenue that exceeds the revenue are "debts" or undertakings to pay, and are not "appropriations"

of funds in hand and to this extent all such obligations or undertakings are absolutely void—in face of the constitution.

Gunter et al, v. Hackworth et al. 182 Ala. 205;

Hagan v. Commissioners Court of Limestone County, et al. 160 Ala. 544.

Attorney General's Report 1918-20, p. 317.

The Court of County Commissioners may make appropriations for the county health unit, farm demonstration agent, home demonstration agent, child welfare agent, as provided for by statutes, by proper resolutions of said commissioners court at any time, subject to the rules of law set out in this opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 24, 1929.

The Sheriff,
Greenville, Butler County, Alabama.

Sheriff—allowed only one deputy at expense of county where sheriff not on salary basis.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of August 24, 1929, in which you state that the county pays your chief deputy \$125.00 per month, and that you have applied to the court of county commissioners for another deputy who is very much needed and that the State and County would be benefited by the employment of another deputy sheriff.

You request my opinion:

Can the county employ another deputy sheriff and pay his salary?

In answering your question your attention is called to Section 10188 of the Code of Alabama, 1923, which reads as follows:

"10188. DEPUTIES.—In all counties of the State of Alabama which now have not more than two hundred thousand inhabitants according to the last federal census or which may hereafter have such population according to any federal census hereafter taken, in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper, but the coroner of such county shall not be appointed a deputy. Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by

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the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than nine hundred and not more than fifteen hundred dollars, payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county."

Under the provisions of this section you must have one chief deputy, who is appointed by you and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, not less than nine hundred dollars and not more than fifteen hundred dollars.

You may have as many other deputies as you think proper, but there is no provision of law for the payment by the county of other deputies with general office and field duties. The deputy, watchman or attendant provided for in Section 4879 of the Code of Alabama, 1923, has only the special duties set out in this section. His duties under the provisions of this section are limited to watching the jail or prison at night for the purpose of preventing escapes and fires, and to aid in case of sickness among the prisoners. This deputy, watchman or attendant shall be paid a reasonable salary out of the funds of the county, such reasonable salary to be fixed by the court of county commissioners.

Report Attorney General 1926-28, pp. 96-194.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 24, 1929.

The Tax Collector,
Dadeville, Tallapoosa County, Alabama.

Taxes regularly assessed become due and payable at any time from October 1st to January 1st following. Such taxes become delinquent, if not sooner paid, on January 2nd and bear interest from date of delinquency to date of payment at the rate of eight per cent per annum. No authority is, by law, lodged anywhere to remit or reduce such interest.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 5th is acknowledged.

You request my opinion upon the following:

The Court of County Commissioners of Tallapoosa County, by order entered upon the record of said Court, undertook to remit the three mill county school tax and the three mill district tax due by Avondale Mills. Due to such action by the Court of County Commissioners, the Avondale Mills have failed to pay such taxes. Should interest be charged on

such taxes from date of delinquency or from date demand was made upon such mills for payment?

In reply will say that the law upon the subject is entirely statutory and, being plain and unambiguous, is not subject to construction. By Section 195 of Act No. 328, approved September 15th, 1919 (Acts 1919, p. 341) taxes are due and payable at any time from October 1st to January 1st. By Section 200 of said Act taxes not paid by the first day of January of each year become delinquent. By Section 202 of said Act, "all taxes becoming delinquent, bear interest at the rate of eight per cent per annum; and such interest must be added to and collected as part of the taxes, and reported in such manner as the State Auditor may prescribe." By Section 203 of said Act it is provided:

"Upon the payment of taxes and fees and costs, if any, assessed and charged against him by any taxpayer, the collector shall give a receipt therefor from the book mentioned in the next section, showing the name of the taxpayer, the date of the payment, the total assessed value of real and personal property, separately, and stating the aggregate of the state, county and special taxes, **together with the interest**, costs and fees, and such receipt shall be prima facie evidence that such taxpayer has paid all his state and county taxes for that year on real and personal property, and other subjects of taxation contained in his assessment list, and all fees and costs mentioned in such receipt."

The foregoing sections clearly prescribe what must be done by a delinquent taxpayer and what the receipt given by the Tax Collector must show. As already said there is no ambiguity—no room for construction. Taxes become delinquent on the 2nd day of January and interest on such taxes begins then to run. The receipt given by the Tax Collector must show the date such taxes are paid and the interest collected. Taxes becoming delinquent bear interest at the rate of eight per cent per annum. No authority is anywhere given to remit or reduce this interest.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 24, 1929.

The Tax Collector,
Scottsboro, Jackson County, Alabama.

Redemption of lands from purchase at tax sale.

Opinion by Assistant Attorney General Smith.

Dear Madam:

I have your letter of September 10, 1929, in which you state as follows:

"A small farm was sold for taxes at my June tax sale. The farm was bid in for around \$700.00 more than tax and cost. The person who was due to pay the tax has only a life estate in the farm, at her death it goes to her former husband's heirs. She is now ninety-two years of age.

The purchaser at the land sale bid on the farm thinking he was bidding on clear title to land.

One of the heirs has redeemed the land in name of all the heirs and this \$700.00 was used in making the redemption, that is, the heir put up the tax and cost and interest and this excess was added to it and paid to the purchaser.

The woman who has a life-estate in the land does not offer to redeem the land but demands that the excess \$700.00 be paid over to her."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Has she a legal right to the excess of \$700.00 paid by the purchaser at the tax sale?

I am of the opinion that she has only a right to redeem this property as provided in Section 3111 of the Code of Alabama, 1923. In the event she does not redeem within the time required by law, she will lose her life estate in and to said property. Under no circumstances could she refuse to redeem and then claim the amount paid by the purchaser at said tax sale.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 24, 1929.

Mr. W. S. Sconyers,
Member, Board of Education,
Headland, Henry County, Alabama.

Schools—Person who has been assistant teacher of county high school cannot be elected principal of such school.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of September 12, 1929. You state that prior to June 7th, 1929, the County Board of Education elected Prof. J. J. Yarbrough, as principal of the schools at Headland, including Henry County High School. You also state that on June 7th, 1929, the State Board of Education passed a resolution which, in effect, disqualified Prof. Yarbrough to serve as principal, but that the County Board of Education granted him a leave of absence of one year so that he could acquire his degree and thereby fulfill the requirements of the State Board of Education.

You request my opinion:

Can Prof. Yarbrough serve as assistant teacher during the present term without surrendering his right to be principal for the years 1931 and 1932?

In my opinion your question must be answered in the negative. If Prof. Yarbrough serves as assistant teacher during the present term he will thereby disqualify himself for the position of principal in 1931 and 1932.

Section 2 of the regulations of the State Board of Education contains the following:

"No assistant in any county high school shall be elected principal of the school in which he may have taught for any time during the twelve months immediately preceding the date of his election."

The above provision of the regulations of the State Board of Education clearly prohibits the election of a person as principal of a county high school if such person has served as an assistant in such school during the preceding twelve months.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 25, 1929.

The Judge of Probate,
Greenville, Butler County, Alabama.

Commercial Notary—is a public officer and must be a qualified elector.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter in which you state that you have a young lady working in your office who is eighteen years of age.

You request my opinion:

1. Can this young lady be appointed a Commercial Notary?
2. If not, can she by having her disabilities of non-age removed be qualified for appointment as a Commercial Notary?

Answering your first inquiry, it is my opinion that this young lady cannot be appointed a Commercial Notary. The first question that we are here to decide is whether or not a person holding the position of commercial notary is an officer under the laws of this State. This has been answered by our Supreme Court in the affirmative. In the case of the Governor, Use, etc., v. Gordon, 15 Ala. 72, the Court laid down the following doctrine:

"A notary public who receives his appointment and commission from the governor of the state must be regarded as a public officer of the county. The statute requires him to enter into bond with sufficient surety, to be approved by the judge of the county court."

We are unable to find where this decision has been disturbed by either of our courts of last resort. A commercial notary is subject to suit on his official bond as are sheriffs and other county officers. Now that a commercial notary is a county officer under our law, then to be qualified to hold this office he must come under the general qualifications of county officials and

the first one is that to be a county officer he must be a qualified elector under Section 2575, Code of Alabama, 1923. That is, he must have reached the age of twenty-one years. See Section 361, Code of Alabama, 1923. Therefore, this young lady not having reached the age of twenty-one is disqualified from holding the office of commercial notary.

Answering your second question, the fact that she might have her disabilities of non-age removed would not affect the conclusion here reached, as we hold that she must be a qualified elector before she is qualified to hold the office and to be a qualified elector she must have, among other things, reached her majority.

Biennial Report of Attorney General, 1926-28, p. 632.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 25, 1929.

The Judge of Probate,
Scottsboro, Jackson County, Ala.

The treasurer of a county is without authority to pay warrant drawn by court of county commissioners unless there is a direct statute authorizing the issuance and payment of same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 22, 1929, in which you state the following.

"During the year 1928, Raymond Bradford, one of our County Commissioners, was doing certain road construction work in this county under the orders and authority of the Commissioner's Court.

One Virgil L. Downey was killed by an accident during this work and, later on, suit was brought in the Circuit Court of this county, not against the county, nor against Bradford as a County Commissioner, but against Raymond Bradford, individually, for the wrongful death of said Virgil L. Downey.

The Commissioners Court, on August 13, 1928, made the following order on its minutes to defend the suit against Bradford and to pay any damages that might be awarded against him in such suit, to-wit:

'It being shown to the Court that suit has been brought in the Circuit Court of this county against Commissioner Bradford for the wrongful death of Virgil L. Downey; it is ordered that the county defend said suit and also pay any damages that may be awarded against said Bradford in such suit.'

You request my opinion:

Would the Commissioners Court of Jackson County be authorized to issue warrant in payment of cost of litigation in the above cause, and in payment of whatever damage may be awarded the estate of Virgil L. Downey?

The Commissioners Court of your county is without authority of law to issue such warrant, and the treasurer of your county is also without authority of law to pay same even though it be issued by the Commissioners Court.

The Commissioners Court of your county was wholly without authority of law in making the order set out above, and, therefore, it is void and cannot be enforced. The courts of county commissioners of the various counties of the State are purely of statutory origin, and whatever powers they have are derived from the statutes. They have no inherent or constitutional powers.

State v. Street et als. 23 So. 807, 117 Ala. 213;
Edwards v. Williamson, 70 Ala. 145.

I gather from the facts stated by you that this action is against an individual, and not against the county or any agency of the county. Therefore, whatever judgment may be obtained against Bradford will be an individual judgment, if one should be obtained, and the Commissioners Court is without authority, by resolution or otherwise, to assume this debt or liability. The fact that Bradford is one of the county commissioners, and happens to be doing certain work in the construction of a public road for the county, could make no difference as long as the suit was against him as an individual. The county could, under no circumstances, be made liable for damages adjudged against him, or the expense of the suit.

Weakley et als. v. Henry, County Treasurer, 204 Ala. 463.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 25, 1929.

The State Auditor,
CAPITOL.

State Auditor—power to refund money under Section 330, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of August 20, 1929, enclosing a letter of August 10, 1929, which was written you by the Judge of Probate of Blount County, which letter states the following:

“On June 3, 1929, certain lands of the Tri County Land Co., were sold for taxes for 1928 and on June 29th, 1929, a certified check for

\$232.43 was presented to redeem this land, the check was drawn on Woodlawn Savings Bank, Woodlawn, Ala. Check was certified on June 28th, 1929, I deposited the check in First National Bank of Oneonta, Ala., on July 3rd, 1929. The check was returned to me on July 11th, 1929, with a slip attached containing the following "BANK REPORTED IN HANDS OF STATE BANKING DEPARTMENT." I remitted to the State on July 3rd, 1929, the amount of \$72.23.

I have made demand on the Tri County Land Company for the full amount, they say, they are out of money and can't pay it. I have paid both the State and County and the turned down check is charged to my account. As I see it, I think the State and County should return to me my money and let the redemption be canceled, I do not feel that it is right for me to hold the bag longer, I do not know when this bank will re-open, whether at all, if it does it may not pay more than 10% to its depositors, it may not pay anything, so you see where it will leave me. I tried to play safe, I required the check to be certified. If you agree with me, please send me a warrant for the amount I remitted to the State, also note your willingness for me to cancel the redemption."

You request my opinion:

Can I, as State Auditor, refund under Section 330, Revenue Law of Alabama, 1929, the state taxes which were paid the State Treasurer on redemption of these lands?

It is my opinion you are without authority of law to so refund. Section 330, *supra*, is as follows:

"330. Refund of overpayments by officials.—The State Auditor must draw his warrant on the State treasurer in favor of any judge of probate, tax collector, county treasurer, clerk of the circuit court, or other officer paying money into the State treasury, for any amount overpaid into the treasury by such judge of probate, tax collector, county treasurer, clerk of the circuit court, or other officer."

The facts as stated above by the Judge of Probate do not bring this payment under the provisions of the above quoted section. It is not an overpayment of any funds going to the State Treasurer. I take it that the amount paid by the Judge of Probate was the correct amount due the State from this redemption. If this be true it could not be classed as an overpayment.

When the Probate Judge received this check, even though it was certified, he did so at his peril as it was not a legal tender for the money due on this redemption. The only difference in this check and the ordinary check was the fact that it was certified, and the certification by the bank made it responsible for its payment, and in this case if the bank failed before the check was paid and the Probate Judge on faith of this check paid to the State the amount due, then, as stated above, you, as Auditor, would be without any authority of law to refund the payment as it was the proper amount due the State on such redemption and received by it in the due course of business.

The Judge of Probate received this certified check, and I presume issuing the certificate of redemption, deposited the check in the First National Bank of Oneonta, Alabama, and forwarded at once to the State Treasurer of Alabama, the State's share coming from such redemption. The matter is closed as far as the State is concerned, and you are without power as State Auditor to refund or authorize the Judge of Probate to cancel this redemption.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 25, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Fees: Leased property of foreign corporation required to pay charter fee.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of recent date with enclosures as stated.

You state that you are submitting for my consideration and opinion the matter of the payment of the admission fee of foreign corporation to do business in this State.

It appears from your letter and enclosures that the Florala Lime Products Company, a foreign corporation, has made application to the State Auditor to do business in Alabama, under the provisions of an Act approved March 7, 1907, (Acts of 1907, p. 422) and it is further shown that said company is intending to use and will use certain machinery to the value of \$45,519.37, which is owned by the Mariana Lime Products Company, Mariana, Florida, and that the company contends that it should not pay admission fees to the extent of the value of this lease and this leased machinery, which is going to be operated in Alabama in the transaction of its business as a foreign corporation.

You request my opinion:

After considering the enclosures, which are copies of papers filed with the Auditor, and designated No. 1, No. 2 and No. 3, what is the amount of capital employed in the State, upon which admission fee should be charged this corporation as it seeks to enter the State for the purpose of transacting business?

Answering your question, under the above statement of facts, the amount of capital employed in this State or to be employed in this State, as shown by the enclosures, is approximately \$46,409.00, which, of course, includes the machinery, supplies, material or other movable property valued at \$45,519.37.

This property, which is leased, constitutes a part of the capital employed in this State or to be employed in this State, regardless of the fact that it is leased from the Mariana Lime Products Company. Therefore, in determining the amount of charter fee to be charged the **Floralia Lime Products Company**, this property should be considered in arriving at the actual amount of capital employed or to be employed, in this State.

It has been uniformly held by this office that the meaning of the words "amount of capital actually employed in this State," is its natural and most obvious meaning. The word capital as here used is without limitation, except that it shall be actually employed in the State.

Report of Attorney General, 1922-24, p. 161,

Report of Attorney General, 1926-28, p. 584.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 26, 1929.

Court of County Commissioners,
Abbeville, Henry County, Alabama.

Where right of way for a state highway is, by the State Highway Department, deemed necessary, it becomes the duty of the county in which such highway lies to acquire such right of way.

It is immaterial whether such right of way is deemed necessary for original construction or for repair or maintenance.

Opinion by Assistant Attorney General Evans.

Dear Sirs:

Receipt of your letter of April 10, 1929, is acknowledged. You ask my opinion upon the following:

A state highway was constructed by the Highway Department from Abbeville toward Fort Gaines, Georgia, to the State line. This highway was completed and accepted about two years ago. The county, as required by law, furnished the right of way for said highway. The heavy rains of 1929 greatly damaged a part of this highway. In the opinion of the State Highway Department additional right of way is necessary in order to properly reconstruct and maintain the part so damaged.

You ask, is it the duty of Henry County to acquire this additional right of way and pay for it out of county funds.

In reply will say that, in my opinion, it is the duty of Henry County to acquire and pay for any right of way for state highways though Henry County which the State Highway Department may deem necessary for such highways. This is, as I understand Section 31 of the Highway Code, 1927, specifically provided. Wherever right of way for a state highway is deemed

necessary by the State Highway Department, it becomes the duty of the County in which such right of way lies to acquire it for such use. Said Section 31 reads as follows:

"Right of way for roads; how acquired. The right of way deemed necessary by the State Highway Department for a road or bridge constructed under the provisions of this article shall be acquired by the County in which such road is to be located, without expense to the State. Should the county fail or refuse to acquire the necessary right of way, the State through the State Highway Department shall have authority at the expense of the county to acquire such right of way, either by purchase or by the exercise of the right of eminent domain in condemnation proceedings, as is provided for under the laws of this State."

It will be noticed that the language of the statute is as applicable to additional right of way for a State highway previously constructed, as it is to one decided upon but not constructed. The highway in question was constructed under Section 1331 of Code 1923, which is carried into Highway Code, 1927, as Section 31, without change. Whatever right of way is deemed necessary by the State Highway Department for a state highway, whether such highway has already been constructed or is to be constructed, must be acquired by the county in which such highway is located or to be located. It is nowhere provided that the State, or the State Highway Department, may pay for such right of way. On the other hand, it is specifically provided that the county shall acquire such right of way without expense to the State. It is further provided that if the county shall fail or refuse to acquire such right of way, then the State Highway Department is authorized to acquire such right of way, at the expense of the county, either by purchase or by the exercise of the right of eminent domain. Said Section 31 was doubtless worded as it is to meet any case where the State Highway Department should deem necessary any right of way whether for state highways to be constructed or for further right of way for highways already constructed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 26, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

School Buildings—advertisement by contractor after school building completed.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of July 24, 1929. You enclose letter of July 8, 1929, from R. V. Allgood, Assistant Examiner of Accounts to you. Mr. Lee states

in his letter that the Legislature of 1927 passed an Act which requires all contractors who construct public buildings, roads, bridges, etc., after completion of same to advertise before a final settlement is made.

You request my opinion.

Does the above Act apply to school buildings?

In my opinion the above Act does not apply to school buildings. I presume that Mr. Lee has in mind Subsection (a) of Section 28 of an Act approved August 23, 1927 (General Acts 1927, p. 356). This Act is known as the Highway Act. Said Act requires any person, firm or corporation entering into a contract with this State for the repair, construction or prosecution of any public building or public work, highways and bridges, to execute a bond payable to the State. Subsection (c) of said Act provides that the contractor shall immediately after the completion of the contract give notice of said completion by an advertisement in some newspaper of general circulation published within the city or county wherein the work has been done for a period of four successive weeks. The above Act pertains solely to construction of roads and bridges, and it seems that it has no application to the construction of school buildings.

Section 36, School Code of 1927, provides that the State Board of Education shall adopt rules and regulations for the proper construction of school buildings.

An Act approved February 10, 1927 (School Code of 1927, p. 333) provides that any person, firm or corporation entering into a contract with the State or any county or municipal corporation in this State for the repair, construction or prosecution of any public building or public work shall be required to execute a bond, conditioned that such contractor or contractors, shall faithfully perform such contracts, etc. Said section further provides that persons furnishing supplies can bring suit upon said bond.

The above Section 36 of the School Code, and the above Act approved February 10, 1927, do not provide for advertising by a contractor upon the completion of a school building. However, in my opinion, the State Board of Education has authority to require such advertising if they consider it advisable to do so. Of course, if the State Board of Education does not consider it advisable to require such advertising, they need not do so, because there is no provision of law which expressly requires advertisements of this kind to be made.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 26, 1929.

Probate Judge,
Bay Minette, Baldwin County, Alabama.

Sinking fund which has accrued to discharge bonded indebtedness of county may be invested in interest bearing warrants of the county.

Opinion by Assistant Attorney General Knight.

Dear Sir:

This is to acknowledge receipt of your letter of August 10th. You state that a sinking fund has accrued in Baldwin County for the purpose of retiring the bonded indebtedness of the County.

You inquire whether or not such sinking fund may be legally invested in interest bearing warrants of the County.

I am of the opinion that the sinking fund may be invested in interest bearing warrants of Baldwin County.

Section 61 of an Act approved September 10, 1927, known as the Bond Code provides that all sinking funds provided for the retirement of bonds shall be invested in bonds of such subdivision, or a bond of the United States of America or in bonds of the State of Alabama. General Acts of Alabama, 1927, p. 550, provide that the said Act shall not modify or repeal private, special or local statutes. I refer to this most recent Act of the Legislature in view of the fact that it is indicative of the intention of the Legislature that sinking funds of subdivisions of the State may be invested in securities of that subdivision.

I can draw no distinction between an interest bearing security of a subdivision and an interest bearing warrant of a subdivision. An interest bearing warrant is an interest bearing security.

A Local Act approved July 29, 1927, applicable to Baldwin County provides that the Court of County Commissioners of said County shall have authority to set aside and use such part of the revenue of the County as may be deemed expedient for the purpose of creating a sinking fund for the payment of bonds or other indebtedness and that the Court of County Commissioners shall have the authority to invest such sinking fund in **interest bearing securities.**

It is unnecessary to determine, for the purpose of your inquiry, whether or not a bond and an interest bearing warrant are the same within the contemplation of the Bond Act, particularly Section 61 thereof. This for the reason that the Bond Act referred to specifically provides that it was not intended to repeal any private, special or local Act, therefore, the Baldwin County Act of July 29, 1927, relative to the investment of its sinking fund is unaffected by the Bond Code or an Act approved September 10, 1927 (General Acts, 1927, p. 550).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 26, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Schools—payment of premium on insurance policies on school buildings.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 23, 1929, enclosing letter of Sept. 11, 1929, from Hon. G. W. Wilson, Assistant Examiner of Accounts, together with a bill to the State Board of Administration from Crenshaw County High School in the sum of \$309.29, being a charge for insurance premiums on insurance on said County High School. Mr. Wilson states that this bill was passed for payment by the court of county commissioners of Crenshaw County at the term of January, 1927.

You request my opinion:

Was the action of the court of county commissioners of Crenshaw County legal in ordering said payment to be made from the general funds of the county?

In answer will state that such action on the part of the said court of county commissioners was clearly illegal.

Biennial Report Attorney General, 1926-28, p. 609.

By Section 134, Alabama School Code, 1927, it is provided:

"134. INSURANCE ON SCHOOLS.—The County Board of Education is charged with the duty of seeing that every school building whose title is vested in the State, County or school district is insured for its insurable value, and to this end may use a part of the proceeds of incidental fees, district tax levies, or such other funds as may be specifically set apart for such purpose by the County Board of Education."

It must be understood, however, that the county board of education has no authority to take any portion of the special three mill tax of any school district for such purposes unless said tax is levied for **general** school purposes in said district, and further that said board has no authority to use any special fund for any purpose where such fund is devoted to a **specific** use. The provisions of the Constitution govern as to the use of that portion of the school funds which go to the county from the State on the basis of the number of school children of school age therein, and those provisions must be strictly followed. No legislative act can have the effect legally of nullifying the provisions of the Constitution. No portion of the county one mill tax which may be levied in a county under the provisions of the Constitution can be used for such purposes for the reason that such one mill tax is, by the

provision of the Constitution, devoted to a special use. The special county three mill tax or the bonus fund may be used for such purposes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 27, 1929.

Hon. H. C. Causey, Member,
County Board of Education,
Millry, Washington County, Alabama.

County Board of Education—Right of President of Board to vote in deliberations of Board.

Election of County Superintendent of Education before expiration of term of office.

Calling meet of County Board of Education when President of Board fails to call same.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of August 12, 1929. You state that a new county board of education for Washington County was elected at the general election in 1928. You also state that the old county board of education elected a county superintendent of education about seven months before his term of office expired.

You request my opinion:

1. If a vacancy occurs in the county board of education and a person is nominated to fill the vacancy, does the president of the board have the right to vote for or against him?
2. Can a county board of education, shortly before the members go out of office, elect a county superintendent of education to serve with the new members of the county board of education?
3. Can a county board of education re-elect a county superintendent of education seven months before his term of office expires?
4. If the chairman of the county school board is requested by two members of the school board to call a meeting to elect a man to fill a vacancy in the board and he fails to call the meeting within the required thirty days, does the majority of the county board of education have a legal right to call the meeting and fill the vacancy?

In my opinion, if a vacancy occurs in the county board of education and a person is nominated to fill the vacancy, the president of the board has the right to vote for or against him.

In my opinion, a county board of education can, shortly before the members go out of office, elect a county superintendent of education to serve with the new members of the county board of education, provided the term of of-

fice of the county superintendent of education expires before the new members take office or provided a vacancy occurs in the office of the county superintendent before such new members take office.

In my opinion a county board of education cannot re-elect a county superintendent of education seven months before his term of office expires.

In my opinion if the chairman of the county board of education is requested by two members of the county board to call a meeting to elect a man to fill a vacancy in the board but fails to call the meeting within the required thirty days, a majority of the county board of education has a legal right to call the meeting and fill the vacancy.

The county board of education shall elect one of its members to serve as president, who is entitled to vote in all deliberations of the board.

Section 91, School Code of 1927.

The county board of education shall appoint a superintendent of schools for a term of from two to four years from the first day of July next succeeding his appointment.

Section 138, School Code of 1927.

You will observe from the above section 138 of the School Code that county superintendents hold office from July 1st.

The members of the county board of education are elected at the general election in November:

Section 89, School Code of 1927.

Clearly, if a vacancy occurs in the office of the county superintendent of education the county board of education has authority to fill the vacancy without waiting for the new members of the board to take office.

As I have already stated the term of office of county superintendents of education expires on July 1st of some year, unless there is a vacancy by death, resignation or removal from office. Certainly, a county board of education has no authority to re-elect a county superintendent seven months before his term of office expires. The board would have as much authority to re-elect a county superintendent two or three years before his term of office expires as it would to elect him seven months before the expiration of his term. Such action is against the spirit and intent of the law.

A vacancy in the county board of education shall be filled by appointment by a majority of the members of the county board of education.

Section 88, School Code of 1927.

If the president fails to call a meeting to fill a vacancy the remaining members of the board can hold a meeting to fill the vacancy. Of course, if the remaining members intend to hold a meeting for such purpose, notice must be given to all members, including the president.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 27, 1929.

Hon. D. M. Weakley, Superintendent,
Alabama Boys' Industrial School,
Birmingham, Alabama.

Alabama Boys' Industrial School: Child lawfully committed to institution may be operated upon without consent of parent or guardian.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of September 10, 1929, in which you state that you often receive into the Industrial School children who need operations but that you do not operate unless you receive the consent of the parents or guardians, except in extreme cases of emergency, and then only when the surgeon thinks the child's life is endangered. You further state that you receive boys into the school who need operations to prevent them from becoming invalids or cripples all their lives and that a case in point is that of a boy who has cataracts on both eyes and that in the opinion of the doctors he is going blind if they are not removed. You state further that in some instances the parents or guardians will not give their consent to an operation.

Under the above statement of facts you request my opinion:

When a boy is legally committed to the Alabama Boys' Industrial School, has the school the right and authority to operate upon him if the surgeon and specialist think it will be beneficial, without the consent of parents or guardian?

The answer to your question is in the affirmative.

Section 67 of the Code of Alabama, 1923, reads as follows:

"67. Exclusive custody of children who are committed.—From the time of the lawful reception of any child into the institution, and during his stay, said institution shall have the exclusive care, custody and control of the child, under such rules and regulations as the board of directors may provide."

Under the provisions of this section the Alabama Boys' Industrial School stands in loco parentis to the child and from the time of the lawful reception of the child into the institution, and during its stay, its control is complete and exclusive. The word "care" as used in the statute comprehends everything essential to the needs and welfare of the child, including medical attention. Since the care, custody and control are reposed exclusively in the institution under such rules and regulations as the board of directors may provide, the parents under such rules and regulations may be excluded along with all the rest. There could be no such thing as exclusive control on the part of the institution if any character of control remained in the parent or guardian. One of the essential considerations inherent in the plan for the establishment of the institution appears to be the welfare of the child. During the stay of the child in the institution, the best interests of the child is a question to be

decided by the authorities of the institution in the exercise of its exclusive right of care, custody and control.

I am, therefore, of opinion and so advise you that the authorities of the Alabama Boys' Industrial School may cause a necessary operation to be performed on a child who has been lawfully received into the institution, without the consent of parents or guardian.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 27, 1929.

Hon. W. H. Quillin,
Solicitor of Law and Equity Court,
Russellville, Alabama.

Officers: Member of the Legislature cannot hold the office of mayor of city or town, both being offices of profit under Section 280 of the Constitution of 1901.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of August 28, 1929, in which you request the opinion of the Attorney General on the following question of law:

Can a member of the Legislature of Alabama at the same time hold the office of mayor of a city or town in this State under the Constitution of 1901?

In this connection I desire to call your attention to Section 280 of the Constitution of Alabama, 1901, which is as follows:

"Section 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office, hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

Under this Section of the Constitution, I am of the opinion that a member of this Legislature of Alabama is an officer of profit under Section 280 of the Constitution, *supra*.

The word "officer" as used in this provision of the Constitution was unquestionably intended to include all **State, County and municipal** officers not specifically excepted by other provisions of the Constitution.

State vs. Sanders, 187 Ala. 79.

See also former opinions of this office holding that one may not at one and the same time legally hold the office of member of the Legislature of Alabama and deputy or county solicitor.

Opinions of Attorney General, 1926-28, p. 105.

I am therefore of the opinion that a member of the Legislature is an office of profit, and under the case of *State vs. Sanders*, supra, a mayor of a town or city is an office of profit under the Constitution. The acceptance and qualification for the second office automatically vacates the first office.

Shepherd vs. Sartain, 185 Ala. 439.

Attorney General's Report, 1926-28, p. 105.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 27, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

The decision and opinion of a Circuit Court, though not appealed from, is not conclusive as to the proper construction of a statute except as applies to the particular case decided. It is not binding upon administrative officers in dealing with such matters in cases other than the particular case decided and constitutes no protection to such officers in dealing with other cases.

Chauffeurs driving busses hauling school children to school are required to take out chauffeur's license under Section 25 of Act No. 290, approved Sept. 13, 1923.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 23, 1929, is acknowledged. You state that the Judge of the Circuit Court of Chambers County, in a case before him decided that chauffeurs driving busses hauling school children to school were not liable for chauffeur's license provided by Section 25 of Act No. 290, approved September 13, 1923, (Acts 1923, page 292 et seq.).

You ask whether or not, on account of said decision, chauffeur licenses collected in Chambers County should be refunded.

You ask further whether I will take an appeal in this case so that you may advise the Judge of Probate.

In reply to your first question, will say that, in my opinion, the decision in the Circuit Court is clearly erroneous and no refund of license collected should be made.

In reply to your second question will say that you fail to inform me in what kind of a case the decision was made. If a criminal prosecution was had and the judge found the defendant not guilty, there would probably be no appeal that the State could take.

If the decision was made in a civil suit for the license, it depends on what was done by the solicitor and how the case was presented as to whether the question could be reviewed on appeal to the Court of Appeals.

Of course, the decision of the Circuit Court settles the question in the case presented as to past acts, but not as to other cases or future acts of the same person.

The State cannot appeal in a criminal case except where the Court holds a statute to be unconstitutional. If no exceptions to the ruling of the trial court are reserved or presumed, the ruling claimed to be erroneous cannot be reviewed by an appellate court. So, until I am advised of the exact status of the case tried, I cannot tell whether or not the ruling of the Circuit Court could be reviewed on appeal. If such ruling cannot be reviewed on appeal it would be a useless expense, if appeal lies, to appeal the case to an appellate court from the Circuit Court.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 28, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Funds derived by a county under the provisions of Act No. 340, approved August 27th, 1927, cannot legally be used for paying debts due for work done prior to receipt of such funds by the County.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 26, 1929, is acknowledged. You ask can a County legally pay debts due for maintenance of public roads during the month of October out of the gasoline taxes which will be distributed to the County by the State in November.

In reply will say that your question is substantially answered in an opinion written by me on May 29, 1929, to the Judge of Probate of Pike County. In that opinion I said:

"It is my opinion, from a careful study of said Act, that it was the legislative intent to provide a fund, which would be constantly coming to the County and available for current maintenance and repair of roads. It was not intended that such taxes should, or could, be pledged in advance for the giving of credit, or be used, at any time, for the payment of

anything other than current expenses for maintenance and repair of roads, highways and bridges of said County."

The foregoing clearly means that no debt or obligation incurred prior to the distribution of such tax can legally be paid out of such tax when received by the County. The act in question (Act No. 340, approved August 27, 1927) contains the following:

"Provided, however, that all the funds derived by the several counties from said tax shall be expended exclusively for maintenance and repair of roads, highways and bridges in said County."

If all the funds derived shall be expended exclusively for maintenance and repair of roads, highways and bridges, there will be none left to pay prior debts no matter for what work or purchase previously made. Besides no authority is given for paying debts with such money when received.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 28, 1929.

State Tax Commission,
CAPITOL.

Motor vehicles: Exemption of non-resident owners: When let for hire exemption ceases.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of September 23, 1929, in which you request the opinion of the Attorney General on the following question of law:

What construction should the Tax Commission place on the words "for hire" as used in Section 19 of the Act approved July 22, 1927 (General Acts, 1927, p. 160) which exempts non-residents from payment of the license tax on motor vehicles.

I am of the opinion the above exemption of motor vehicles clearly means motor vehicles used by visitors sojourning in this State, or passing through this State. This is a reciprocal exemption. If a visitor sojourning in this State lets the motor vehicle for hire in this State, he of course is no longer entitled to the exemption. The legal definition "for hire" is as follows: "Is to let the temporary use of an article for compensation."

Harris vs. Atlantic City, 62 Atlantic 995.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 28, 1929.

Hon. T. M. Searcy,
Notary Public and Justice of the Peace,
R. 2, Shorterville, Henry County, Alabama.

Justice of the Peace:

1. Power to sentence to hard labor.
2. How costs are paid where defendant is acquitted or insolvent.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of recent date in which you request my opinion:

1. On conviction where no appeal is taken, can a justice of the peace sentence to hard labor?
2. Can he, under any conditions, sentence to the penitentiary?
3. In cases where defendant is acquitted or is insolvent and not able to pay the costs, how are said costs collected?

Answering your first inquiry I refer you to Section 5290, Code of Alabama, 1923, which is as follows:

"5290. On default in payment of fine and costs, imprisonment or hard labor imposed.—If the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail, or at the discretion of the court, sentenced to hard labor for the county as follows: If the fine does not exceed twenty dollars, ten days; if it exceeds twenty dollars and does not exceed fifty dollars, twenty days; if it exceeds fifty and does not exceed one hundred dollars, thirty days; if it exceeds one hundred and does not exceed one hundred and fifty dollars, fifty days; if it exceeds one hundred and fifty, and does not exceed two hundred dollars, seventy days; if it exceeds two hundred and does not exceed three hundred dollars, ninety days, and for every additional one hundred dollars, or fractional part thereof, twenty-five days."

I think it is clear from the above section that you have the power to sentence for the fine when the same is not presently paid or judgment confessed according to the provisions of the above statute. However, you cannot sentence to hard labor for costs. This is forbidden by Section 3849, Code of Alabama, 1923, which is as follows:

"3849. No jurisdiction to sentence to hard labor for costs.—It shall not be lawful for any justice of the peace, or notary public, with the powers of a justice of the peace, to sentence any person to hard labor for the non-payment of costs."

Answering your second inquiry, there is no authority of law under which you can sentence to the penitentiary. Penitentiary punishment is meted out as punishment only in felony cases and you have no jurisdiction over these except for preliminary investigations.

In answering your third inquiry, where the defendant is acquitted or insolvent and unable to pay after conviction, you may, under Section 3850, Code of Alabama, 1923, Subsection 2, apply fines collected in other cases to the payment of the costs of the justice of the peace and constable provided you follow strictly the provisions of this section.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 28, 1929.

Hon. Stuart Graves,
Temporary Acting State Health Officer,
CAPITOL.

State Board of Health: May discontinue water supply: Orders enforced by injunctive process: Installation of waterworks without permit illegal.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of September 10, 1929, in which you call attention to the enclosed copy of a report of the Assistant Sanitary Engineer of the State Health Department on a water supply at Warrior, Alabama, setting forth that the Town of Warrior is completing the installation of a public water supply, proposed for fire protection and general use other than human consumption; that plans for the complete system have been drawn, but only the part of the system necessary for fire protection is to be installed at present; that when its finances will permit, the town proposed to install treatment works; that the Black Warrior River is the source of supply; that the water is to be delivered through a four-inch cast iron pipe line already installed; that mains have been laid on main streets and connections made to some individuals; that the municipality proposes to submit plans for the system to the State Board of Health under the State Water Law; that water has already been pumped into the mains but has been cut off until written agreement with each user has been drawn, specifying that the water is not to be used for human consumption.

You state that the using of the water delivered to private premises for domestic purpose is considered likely, and that the water in question untreated is considered potentially dangerous.

Under the foregoing statement of facts you request my opinion:

1. Under the conditions outlined would the State Board of Health have authority under Sections 1161 to 1179 of the Code of Alabama, 1923, to require the discontinuance of water delivered to private property from such mains?

2. Under the conditions outlined, what authority has the State Board of Health under any statute to so proceed?

3. Under the conditions stated, is the building of this supply legal, a permit not having been obtained from the State Board of Health?

The answer to your first question is in the affirmative. The authority of the State Board of Health to discontinue this water supply to private property is found in Section 1169 of the Code of Alabama, 1923, which reads as follows:

"1169. Order of board on finding water impure or unwholesome.— Upon completion of any investigation said board, if it shall determine as a fact that the water being supplied or to be supplied is such that under all circumstances and conditions it is impure, unwholesome, or unpotable, or may constitute a menace or danger to the health or lives of human beings, or that under all circumstances and conditions the existing or proposed works, systems, plant, or water supply or proposal modifications thereof are not suited to the production and delivery of healthful, pure, and wholesome water, shall order the owner or operator to make, within a time to be designated by said board, such changes as said board deems necessary to secure a continuous supply of pure, wholesome, potable and healthful water, or may prohibit the use of said water supply or any modification, construction or operation of said works, system or plant. Thereafter it shall be unlawful to use said water supply or to modify, construct or operate said works, system or plant, till said prohibition is withdrawn."

The answer to your second inquiry is also found in Section 1169, Code of Alabama, 1923, *supra*. Provision for enforcing the orders of the State Board of Health by injunctive process is found in Sections 1175 and 1176 of the Code of Alabama, 1923.

Answering your third inquiry, I am of opinion that the installation being undertaken by the municipality without a permit, is illegal and in violation of Section 1174 of the Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 3, 1929.

The Judge of Probate,
Scottsboro, Jackson County, Alabama.

Election: Judge of probate required to furnish election inspectors with lists of qualified voters in special election.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of September 23, 1929, in which you state that the County Board of Education recently divided Jackson County into two districts and petitioned the Commissioners Court to order an election in each district to vote on the three mill school tax, and that the Commissioners Court has ordered the election for October 5, 1929.

You request my opinion:

1. Is the judge of probate required to furnish the election officials a copy of the lists of qualified voters for such election?
2. Do your two opinions on pp. 146 and 147 of your last reports cover such a district school election as this?

The answer to your first question is in the affirmative. Under the provisions of Section 387 of Code of Alabama, 1923, as amended by an Act approved August 20, 1927, (Acts 1927, p. 275), the judge of probate is required to make correct alphabetical lists of all qualified electors registered by precincts and by districts of precincts, where precincts have been divided or subdivided. However, you are not required to publish this list. This amended section only requires the publication of lists enumerated, every two years, consequently, the said lists are not to be published in odd years. The amended part of this section clearly requires that the judge of probate shall deliver, or cause to be delivered, to the inspector at each voting place in his county a list of said qualified electors immediately preceding **every election or primary.**

Under the provisions of Section 402 of the Code of Alabama, 1923, as amended by an Act approved August 20, 1927 (Acts 1927, p. 277), you are authorized to employ **such assistants and clerical help** as may be necessary to complete and properly prepare said list of qualified electors.

The answer to your second question is also in the affirmative. Both of these opinions have reference to special elections in odd numbered years and are applicable to district three mill tax elections. In preparing and furnishing the inspectors with lists of said qualified electors, and in employing assistants and clerical help, you should follow closely Sections 387 and 402 of the Code, as amended by the Act approved August 20, 1927, *supra*.

See Acts 1927, pp. 275, 277

Report Attorney General, 1926, pp. 146, 147.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 2, 1929.

Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Crenshaw County—Salary of County Solicitor. Local Act construed.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of September 23, 1929, with copy of letter of Mr. G. W. Wilson, Assistant Examiner of Accounts to you enclosed. Mr. Wilson states in his letter that prior to the passage of an Act in 1927 the County Solicitor

of Crenshaw County was paid a salary of \$1000.00 per annum and that the Act of 1927 increased the salaries of County Solicitors to \$1200.00 per annum.

You request my opinion:

Is the County Solicitor of Crenshaw County entitled to receive the \$1200 per year salary which was allotted by the Legislature of 1927?

In my opinion the county solicitor of Crenshaw County is not entitled to receive a salary of \$1200 per year but is entitled to receive only \$1000 per year as provided by the Local Act for Crenshaw County.

An Act approved Sept. 26, 1919 (Local Acts of 1919, p. 223) provides for the election of the County Solicitor for Crenshaw County and provides that such solicitor shall be paid a salary of \$1000 per year.

An Act approved September 9, 1927 (General Acts of 1927, p. 513) amends Section 5523 of the Code of 1923 and provides that deputy solicitors shall be paid an annual salary of \$1200. This Act provides however, that it shall not be construed to repeal any local or special laws fixing the salary of deputy solicitor in any other County in this State.

I rendered an opinion on October 18, 1927, to the Judge of Probate of Bullock County (Biennial Report of 1926-28 p. 325) in which I held that the above Act approved Sept. 19, 1927 did not affect the salaries of County Solicitors in those Counties which had prior local acts, providing the amount of salaries to be paid County Solicitors.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 3, 1929.

Hon. W. J. Carpenter, Mayor,
Reform, Pickens County, Alabama.

An officer, holding office under the authority of this State, convicted of felony and is sentenced to the penitentiary stands automatically suspended from such office.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of September 19, 1929, in which you state as follows:

We have a man here holding the office of bonded police who has recently been convicted in the Circuit Court of Walker County for the crime of manslaughter in the first degree and sentenced to eighteen months in the penitentiary. The judgment of the court has been suspended, and he has appealed his case to the Supreme Court or Court of Appeals.

You request my opinion:

Does this conviction automatically suspend him as such police officer?

It is my opinion it does. Section 2699, Code of Alabama, 1923, dealing with matters of this character is as follows:

"2699. Sentence of officer to the penitentiary vacates office.—When any person, holding any office or place under the authority of this state, is sentenced by any court of the United States, of this state or any state, to imprisonment in the penitentiary, or hard labor for the county, his office or place is vacated from the time of the sentence; and if the judgment is reversed, he must be restored; but if pardoned, he must not."

You will note from the above quoted section the following: "When any person, holding any office or place under the authority of this state, * * *." The question that presents itself here is simply this: Does a police officer of a municipality hold said office or place under the authority of the State? If he does so hold by such authority, then he comes under the provisions of Section 2699, supra. It is my opinion that he does hold such office under the authority of the State, and that on conviction for a felony such as manslaughter in the first degree, under the authority of Section 2699, supra, and the case of *ex parte Diggs*, 50 Ala. 78, his office becomes vacant and he stands suspended unless the Supreme Court or Court of Appeals should reverse his case, then in that event he is entitled to be restored to such office.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 3, 1929.

The County Treasurer,
Mobile, Mobile County, Alabama.

Commissioners Courts or Boards of Revenue have no power except that conferred by statute.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of September 4, 1929, in which you state that the Mobile County Board of Revenue recently sent the chief mechanic at the county garage to Montgomery to take special lessons pertaining to tractor parts and repairs.

You request my opinion:

Can I as County Treasurer pay warrant drawn by said Board to defray the expenses of this mechanic while taking these special lessons?

In reply to your inquiry will say that you cannot. I am unable to find any statute or the construction of any statute that could give your Board of Revenue the authority to draw such warrant or you to pay the same.

Weakley et al vs. Henry, County Treasurer, 204 Ala. 463,
Opinions of Attorney General, 1926-28, pp. 496, 266.

Whatever power Courts of County Commissioners or Boards of Revenue have is derived from the legislature. They have no inherent or constitutional powers.

State vs. Street et al, 23 So. 807.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 3, 1929.

The Judge of Probate,
Bay Minette, Baldwin County, Alabama.

Courts of County Commissioners or Boards of Revenue may issue interest bearing warrants payable out of the general funds of the County only as provided by Sections 6776 to 6789, both inclusive, of Code of Alabama.

Courts of County Commissioners or Boards of Revenue may issue interest bearing warrants to pay debts contracted for the erection of public buildings, bridges or roads, payable out of the proceeds of the levy and collection of the one fourth of one per centum authorized by Section 215 of the Constitution for such purpose, provided the County has not reached the debt limit fixed by Section 224 of the Constitution of this State.

Counties cannot contract with any department of the state to build County roads; but may contract with individuals, partnerships or private corporations for such purpose.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of August 14th is acknowledged. You request my opinion upon the following:

1. Can the Board of Revenue of Baldwin County issue interest bearing warrants and sell them for the purpose of raising funds with which to build roads.

2. If not, can said Board let contracts to the State of Alabama or to an individual and pay for the construction of the road by the issuance of interest bearing warrants, payable at a future date. If it can issue such interest bearing warrants, can such warrants be issued when the contract is let or should they be issued as the work is done under the contract.

In reply will say: By Section one of Local Act No. 177, approved July 29, 1927 (Local Acts 1927, p. 83, et seq.) a Board of Revenue of Baldwin

County is created and by Section 2 of said Act such Board is given the authority "to exercise the powers, jurisdiction, authority, duties and privileges, legislative, judicial, executive and ministerial that are now or may hereafter be conferred upon Courts of County Commissioners, Boards of Revenue or other like governing bodies of the counties."

In said Section 2, authority is given said Board "to levy a general tax for general and a special tax for special county purposes according to the provisions of the laws of Alabama.

By Section 215 of the Constitution of Alabama, taxes levied for general county purposes are limited to one half of one per cent in any one year on the value of the taxable property therein; but, it is provided therein, "that to pay any debt or liability now existing against any County, incurred for the erection, construction or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges or roads, any county may levy and collect such special taxes, not to exceed one fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

By Section 224 of the Constitution of Alabama it is provided:

"No county shall become indebted in an amount including present indebtedness, greater than three and one-half per centum of the assessed value of the property therein; provided, this limitation shall not affect any existing indebtedness in excess of such three and one-half per centum, which has already been created or authorized by existing law to be created; provided, that any county which has already incurred a debt exceeding three and one-half per centum of the assessed value of the property therein, shall be authorized to incur an indebtedness of one and a half per centum of the assessed value of such property in addition to the debt already existing. Nothing herein contained shall prevent any county from issuing bonds, or other obligations, to fund or refund any indebtedness now existing or authorized by existing laws to be created."

The questions asked by you must be considered with reference first to the general funds of the county, and second, with reference to the one fourth of one per centum which may be levied under the provisions of Section 215 of the Constitution of Alabama to pay debts contracted for "the erection of necessary public buildings, bridges or roads."

With reference to the general funds of the County, will say that, in my opinion, such Board may, within the limitations prescribed by statute in Sections 6776 or 6781 both inclusive of the Code and by Section 224 of the Constitution and by compliance with Section 6789 of the Code, issue interest bearing warrants to meet the necessities of the budget. The budget may include an appropriation for constructing public roads in the County, provided the debt limit of your County has not been reached.—Commissioners Court Tuscaloosa County v. State, *ex rel* City of Tuscaloosa. It will be kept

in mind that the Act of September 25th, 1919 (Acts 1919, page 722) gave Courts of County Commissioners authority to adopt a budget system for conduct of County affairs. Under this, the adoption of a budget system by the Court of County Commissioners, or Board of Revenue, was discretionary. —Rhodes vs. Marengo County Bank, 205 Ala. 667. By Section 6789 of the Code of 1923, the adoption of such budget system is made mandatory. This Section reads as follows:

“6789. Budget system adopted by county.—Courts of county commissioners, boards of revenue, or other governing bodies of counties must adopt a budget system for the conduct of the affairs of the county, and to this end may appropriate from the county treasury sufficient funds to pay the actual expenses of the county as shown by the budget so adopted.”

As against the general county fund no interest bearing warrant can be issued for the specified purpose of raising funds with which to build public roads. Such warrants, when issued, must be issued to temporarily meet the requirements of the budget, and must be made payable not later than February 1st of the year following and shall not be renewed. Such warrants shall bear interest not exceeding eight per cent per annum and shall not be of a greater sum than one half the income of said county for the preceding year. This, in my opinion, means, one half the income which may be applied to payment of a budget. It does not include special taxes, specially applied by law, such as the general three mill county school tax, the one mill county school tax, the three mill district school tax or the one quarter of one per cent tax for payment of debts contracted for erection of public buildings, bridges or roads. It was the legislative intent that such warrant, when issued, should be paid out of the general county revenue collectible in the tax year in which issued. A little margin was allowed in date of maturity for completion of such collection. The word “year” as used in the statute means, in my opinion, fiscal year.—Code 1923, Section 9.

The foregoing answers all of your questions as related to the general funds of the County.

We come next to your questions as related to funds to be derived from a levy and collection of the one fourth of one per centum, authorized by said Section 215 of the Constitution, for the purpose of paying debts contracted for the erection of public buildings, bridges and roads.

By the very words of the Constitution, the tax can be levied and collected only for payment of such debts. When such debts accrue, interest bearing warrants may be issued in payment of them, such warrants being made payable out of the proceeds of such levy and collection. If the County has reached the debt limit, as fixed by Section 224 of the Constitution, no further valid debts can be incurred and, hence, no valid warrants could be issued to pay debts contracted by the Board of Revenue beyond such debt limit.—Littlejohn v. Littlejohn, County Treasurer, 195 Ala. 614.

I know of no statute, nor did you cite any, authorizing the County to contract with the State of Alabama to build highways for the County. Of course, the Board of Revenue may contract with individuals or private corporations for such purpose, where the debt limit of the County has not been reached. The authority to contract debts for the "erection of public buildings, bridges and roads is implied by the authority granted by the Constitution to levy tax of one fourth of one per centum to pay such debts.—Littlejohn v. Littlejohn, *supra*. But no valid debts can be contracted for any purpose beyond the limitation fixed by Section 224 of the Constitution of Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 5, 1929.

Hon. R. L. Mullen,
Chairman, Board of Registrars,
Talladega, Talladega County, Alabama.

Board of Registrars—not authorized to register applicants who are not twenty-one.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of September 14, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not the Board of Registrars are authorized to register applicants who will reach the age of twenty-one before the next election?

I am of the opinion that, under Section 177 of the Constitution of 1901, the Board of Registrars are not authorized by law to register an applicant who will reach the age of twenty-one before the next general election in this State. The applicant must be twenty-one years of age at the time he or she makes application to the Board of Registrars for registration as a voter.

"The Act passed in 1915 providing for the registration of electors, expressly provided for the registration of such minors, (General Acts 1915, p. 239 Section 22).

This Act has been repealed by Acts 1920, p. 124, which repealing Act made no provision for the registration of minors. I am of the opinion that the provision of 1915 was repealed because of its unconstitutionality.

Section 177 of the Constitution defines an elector, providing that he shall be entitled to vote at any election of the people. One of the qualifications of an elector as set out in this section is an age of twenty-one or upwards.

Section 181 of the Constitution reads as follows:

"After the first day of January, 1903, the following persons, and no others, who, if their place of residence shall remain unchanged will have, at the date of the next general election, the qualifications as the residence prescribed in Section 178 of this Article, shall be qualified to register as electors, provided they shall not be disqualified under Section 182 of this Constitution." (Emphasis provided.)

"Although we find no express provision that only persons over twenty-one years of age shall be allotted to register, we think that is the reasonable conclusion from the two sections of the Constitution above referred to.

Section 177 provides that an elector is one who is qualified to vote; that one of the qualifications is an age of twenty-one years or over.

Section 181 provides who shall be qualified to register "as electors." Although the age limit is not expressly provided, it seems clear that only electors were intended to be registered, and an elector must be twenty-one or over.

Another provision that strengthens my conviction in this conclusion is the express provision of the section above quoted, that one who shall have the qualifications as to residence at the next general election shall be allowed to register. This express provision as to residence negatives, we think, the presumption of an intention of allowing one to register who shall have the qualifications as to age at the next general election."

Biennial Report of Attorney General, 1922-24.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 7, 1920.

Clerk, Circuit Court,
Prattville, Autauga County, Alabama.

Witnesses in preliminary proceedings before the Judge of the Inferior Court of Autauga County, not paid out of the Inferior Court fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 3, 1929, in which you request my opinion as follows:

1. Can witnesses who attend a preliminary hearing before the Judge of the Inferior Court of Autauga County be paid for their attendance out of the fund of the Inferior Court of Autauga County under Section 17½ of an Act approved August 9, 1927, (Local Acts, 1927, p. 137)?
2. If not, then how are such witnesses paid?

In reply to your first inquiry, it is my opinion they cannot be paid out of the fund of the Inferior Court of Autauga County, Alabama. Section 17½ of the Act creating the Inferior Court of Autauga County as amended by an Act approved August 9, 1927 (Local Acts, 1927, p. 137) regulates how witnesses attending said Court are paid and makes no provision for payment of witnesses in preliminary investigations. It is true that Section 5 of the Act creating the Inferior Court of Autauga County approved September 26, 1923, (Local Acts, 1923, p. 244) confers on said Court all the powers and jurisdiction of Justices of the Peace in criminal and civil cases, but this primarily refers to cases where the Justice has final jurisdiction. When he sits in a preliminary investigation he does not sit in the capacity of a Justice of the Peace, but sits as a committing magistrate under Sections 5136, 5217 and 5218, Code of Alabama, 1923. In a preliminary proceeding a committing magistrate does not act as a court of justice but only as an officer deputed by law to conduct a preliminary investigation.

Withers v. State, 36 Ala. 264,
Ex parte Cist, 26 Ala. 161.

As to the duties of magistrates, see Marks and Co. v. Hastings, 101 Ala. 165.

Answering your second inquiry, the Judge of the Inferior Court having conferred upon him all the powers and jurisdiction of a Justice of the Peace has jurisdiction in preliminary hearings only by virtue of Section 3 of the Act, supra, and Section 5136, supra, and when sitting in such he does not sit as Judge of the Inferior Court but as a magistrate and, therefore, all the costs of the magistrate, constables, and witnesses must be paid as provided in Section 3755 of the Code of Alabama, 1923.

Report of Attorney General, 1918-1920, p. 523.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 9, 1929.

The Sheriff,
Selma, Dallas County, Alabama.

Deputies—Sheriff responsible for their acts even though their authority is limited unless the fact is made known to those with whom he deals.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 7, 1929, in which you request my opinion as follows:

What is my responsibility in connection with commissioned deputy sheriffs where they are commissioned but do not act as such except by instructions from me, drawing no salary?

Section 10188, Code of Alabama, 1923, provides that you may have as many deputies as you may think proper, but if you appoint a deputy and you give him instructions limiting his authority to a particular act or acts, the person with whom he deals is not affected by them unless they are brought to his knowledge.

Ramsey v. Strabash, 52 Ala. 513.

Rogers v. Harold, 111 Ala. 610.

The fact that you do not pay such deputy any salary could make no difference. That is a matter of contract between you and your deputies in which the public has no concern. When you appoint a deputy, even though you may limit his authority, his acts would be your acts in connection with **any of the duties of your office**, and you would be liable on your bond for any misconduct of this deputy unless the knowledge of his limited appointment was in some way brought home to the party with whom he was dealing.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 9, 1929.

Clerk of the Circuit Court,
Pell City, St. Clair County, Alabama.

Fines—Fines cannot be paid in script unless otherwise expressly provided for.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 21, 1929, in which you request my opinion as follows:

Whether or not one convicted of violating highway traffic law in October, 1927, can pay the fine of \$25.00 in script in April, 1929?

Section 4038, Code of Alabama, 1923, provides as follows:

"All fines and forfeitures shall be paid in **money**, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the State, for the use of the particular county."

In my opinion said fine cannot be paid in script, unless otherwise ex-

pressly provided for, regardless of when the new Highway Code went into effect.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 9, 1929.

The Superintendent of Insurance,
CAPITOL. •

1. Construction of Section 2649, Code of Alabama, 1923.
2. Where bonds or securities are erroneously sold in an attempted compliance with the provisions of Section 2649 of the Code, the Clerk or Register of the Circuit Court, Superintendent of Insurance, or State Treasurer—whichever one has made the error and his bond—is liable to respond in damages to whomsoever is injured by such erroneous sale.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of August 3, 1929, is acknowledged. You ask my opinion upon the following:

1. When the Superintendent has made requisition on the State Treasurer as provided by Section 2649 of the Code of 1923, has the Treasurer the right to delay action in complying with such requisition until he has time to investigate the regularity of the judgment on which the requisition is made?
2. Is the bond of the Superintendent of Insurance, or the bond of the State Treasurer, or both jointly, liable for any damage that may be caused by an erroneous sale of said securities in attempting to comply with the provisions of said Section 2649, due to defects or irregularities appearing in said judgment?

In reply to your first question will say that, in my opinion, upon a requisition made by the Superintendent of Insurance upon the State Treasurer, in substantial accordance with the provisions of said Section 2649 of the Code, it thereupon becomes the imperative duty of such Treasurer to sell such bonds or securities and to comply with all the other duties connected therewith devolving upon him as provided by said statute. The Treasurer should not delay longer than is necessary to reasonably effectuate such duties.

Whether or not such requisition is in substantial accordance with the provisions of said Section is a matter for consideration by said Treasurer. If in his judgment, it is not, he should delay until a proper requisition is made.

In reply to your second question, will say that where bonds or securities are erroneously sold in attempting to comply with the provisions of said Section 2649, and some one is injured by such erroneous sale, the officer, who made the error, and his bond are liable to respond in damages to such

person. Such error may be made by the Clerk or Register of the Court certifying to the Superintendent of Insurance, or by the Superintendent of Insurance in making the requisition, or by the State Treasurer in making sale upon an imperfect requisition. Damages lie where the error occurs.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 9, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Court of County Commissioners: Employment of relative of member of Court of County Commissioners by supervisor unlawful.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of September 28, 1929, in which you state that you are informed that the Commissioners Court of Pike County intends to employ a Supervisor of Roads, and to give to the Supervisor authority to hire and discharge persons who are to work on the public roads. All this is to be done, however, under the supervision of the Court of County Commissioners.

Under the above statement of facts you request my opinion:

1. Please advise whether or not, where such Supervisor is so employed, he is acting as agent for the Commissioners Court collectively and individually, and so acting can employ any relative of any Commissioner related within the fourth degree by blood or marriage?
2. Is his agency not the agency of each and every one of the members of the Commissioners Court separately and collectively, and if such be the case would not the employment of a relative of any one of the members of the Commissioners Court by such Supervisor be an employment by such Commissioner, and would not the employment by him of such relative be a violation of the criminal law?

Answering your first question your attention is directed to Section 5076, Code of Alabama, 1923, which reads as follows:

"Letting contracts to relatives or employing relatives of commissioners; penalty for.—Any member of any commissioners' court or board of revenue who shall award any contract in which the county of such commissioner or member of board of revenue is interested to any person related, either by blood or marriage within the fourth degree to such commissioner or member of board of revenue, or who shall employ any such relative to do any work for said county, or to act as agent for any such member in any work in which such county is interested, shall be

guilty of misdemeanor and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars."

Under the provisions of the above quoted Section, I am of the opinion that the employment of a relative of any member of the Commissioners Court, either by blood or marriage within the fourth degree, would be unlawful. The Supervisor under the facts above set out is an agent of the Commissioners Court both collectively and individually and under the law an agent cannot do that which the statute expressly forbids his principal to do.

Answering your second question, as stated above, this Supervisor is an agent of each and every member of the Commissioners Court and the employment of a relative of any one of the members of the Commissioners Court by such Supervisor would in law be an employment by such Commissioner and such employment would constitute a violation of the provisions of Section 5076 of the Code of Alabama, 1923, *supra*, which provides a penalty of not less than \$10.00 nor more than \$100.00 for its violation.

On September 26, 1929, I rendered an opinion to a member of the Commissioners Court of Cleburne County which, although it construes mainly a local law of Cleburne County, is of the same tenor and effect as the opinion herein rendered.

See Opinions of Attorney General, Book 14, p. 75 (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 10, 1929.

The Sheriff,
Troy, Pike County, Alabama.

Seizure fees—Seizure fees cannot be collected by the Sheriff out of fine and forfeiture fund in cases where State fails to convict.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 13, 1929, in which you inquire whether or not the Sheriff would be allowed to collect, through the fine and forfeiture fund, his seizure fees in cases where the State fails to convict.

I am of the opinion that the seizure fees do not attach when the State fails to convict as the acts which provide for seizure fees specifically state that such fees attach upon conviction.

Section 4246, Code of Alabama, 1923,
Section 4254, Code of Alabama, 1923,
Section 4659, Code of Alabama, 1923.

Section 4039 of the Code of Alabama, 1923, allowing court officer's fees to be paid out of the general fund when defendant is not convicted, if there be a surplus, is not applicable to seizure fees, same attaching only upon conviction.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 10, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Judge of Probate—compensation for road service.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 7, 1929, enclosing a letter from the Judge of Probate of Escambia County, Alabama, of August 5, 1929, in which he requested an opinion as follows:

As Chairman of the Commissioners Court of Escambia County would I be allowed pay, that is, per diem and mileage for trips for inspection of roads and bridges in the County?

He is not entitled to any other compensation for road service performed as Probate Judge of his County and as an ex officio member of the Commissioners Court except as is provided by a subdivision of Section 7285, Code of Alabama, 1923, which is as follows:

"* * * Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties annually, to be paid out of the county treasury, not exceeding . . . \$400.00. But this shall not apply to any probate judge who receives net annual compensation from his office exceeding \$5,000.00 * * *."

You will note from the above quoted subdivision of Section 7285, supra, that he may receive as ex officio fees for services rendered in connection with public roads of his county a sum up to \$400.00 but this does not mean that he is entitled to the amount as a matter of course. Before any amount can be allowed under this section for ex officio services in connection with the roads of his county he must have complied with Section 7265 of the Code of Alabama, 1923, which is as follows:

"Account for ex officio services itemized and sworn to; maximum of allowance.—Persons entitled to an allowance by the court of county commissioners for what are commonly called ex officio services, shall, before the allowance is made, itemize such services, and make oath thereto, as in the case of other claims against the county. The compensation

allowed shall be the fair and reasonable value of the services, in no case to exceed two hundred dollars per annum, unless otherwise provided by law."

Now if the services shown by the itemized sworn statement is fair and reasonable and amounts to \$400.00 and no more, it should be paid. But, on the other hand, if such statement shows an amount less than \$400.00, for example, \$275.00, then only this amount can be paid.

Again you will note the last clause of this subdivision of Section 7285, supra, provides that if the net annual compensation from his office exceeds \$5,000.00, then this section shall not apply and he would not be entitled to any amount as ex officio fee for this service.

Macon County v. Abercrombie, Judge, 184 Ala. 283.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 11, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Bibb County—Local Acts of 1927 providing informers' fees in prohibition cases held unconstitutional.

Probate Judge—Not liable for fees paid in accordance with unconstitutional Act, prior to Act being declared unconstitutional.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of September 3, 1929, with letter of September 1, 1929, from W. L. Lee, Jr., Assistant Examiner of Accounts, to you, enclosed. Mr. Lee states in his letter that from 1923 to 1927, Bibb County paid to the sheriff and others, certain informers' fees in prohibition cases, and that this amount was paid under authority of General Acts of 1919, p. 824. He also states that since 1927 Bibb County has paid out various amounts to certain persons as informers' fes, under authority of the Local Acts of 1927, p. 303.

You request my opinion:

1. Is the Act approved Sept. 29, 1919, (General Acts 1919, p. 824) constitutional?
2. If not is the Judge of Probate liable on his official bond for the amounts so paid?
3. Is the Act approved August 27, 1927, (Local Acts 1927, p. 303) providing informers' fees in prohibition cases, constitutional?
4. If the sheriff has received any compensation under the above

Act of August 26, 1927, is he liable on his official bond for the amount so received?

5. Can a sheriff ever legally receive an informers' fee?

1. In my opinion the above Act approved Sept. 29, 1919, is unconstitutional. I rendered an opinion on June 17, 1927, to the County Solicitor of Bibb County (Biennial Report of Attorney General, 1926-1928, p. 202, in which I held said Act unconstitutional.

2. In my opinion the judge of probate is not liable on his official bond for any amounts paid by him prior to the time that the above Act was held unconstitutional.

3. In my opinion the above Act approved Aug. 26, 1927, is unconstitutional.

4. In my opinion the sheriff is liable on his official bond for any compensation received by him under the Act approved August 26, 1927.

5. In my opinion a sheriff cannot legally be paid any informers' fee in a prohibition case other than that provided by Section 4626, Code of Alabama, 1923.

The judge of probate who paid informers' fees under the above Act approved September 29, 1919, is not liable for the amounts paid to individuals prior to the time that said Act was declared unconstitutional, because Section 2619, Code of Alabama, 1923, expressly exempts him from liability in such cases.

The above Act approved August 26, 1927, provides certain informers' fees in prohibition cases. This Act violates Section 96 of the Constitution of 1901 because said Section expressly prohibits the enactment of a local law to regulate the costs and charges of courts and is therefore void. Of course, the probate judge is liable on his official bond for any amounts which he may have paid the sheriff under said Act, because the sheriff is a public officer and could not be an informer, within the contemplation of said Act. However, since the sheriff is liable on his official bond for any amounts received by him under said Act, in my opinion, he and his bondsmen should be proceeded against for the collection of said amounts, if the sheriff refuses to refund said amounts.

Section 3734 Code of Alabama, 1923, provides that the law of costs must be deemed and held a penal law and no fee must be taken but in cases expressly provided by law. Sheriffs and other officers cannot claim fees for services performed by them unless they are able to point to some law which clearly authorizes such fees. If they are unable to do this, they must perform the service without compensation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 11, 1929.

Clerk of the Circuit Court,
Evergreen, Conecuh County, Alabama.

Clerk of the Circuit Court—Clerk of the Circuit Court shall not receive compensation for work done for the County other than his regular routine duties.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 3, 1929, in which you inquire whether or not the Clerk of the Circuit Court is entitled to compensation of \$100.00 per annum for acting as Hard Labor Agent over the County convicts. In reply thereto I wish to refer to Section 5024, Code of Alabama, 1923, which reads as follows:

"Any judge of probate, tax collector, tax assessor, sheriff, **clerk of the circuit court**, solicitor, or county treasurer, members of the Court of County Commissioners or Board of Revenue, or any other State or County officer who takes any contract for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers."

This statute makes it a misdemeanor for the Clerk of the Circuit Court to work for the county in dual capacity. Such being the case, I am of the opinion that the Clerk of the Circuit Court is not entitled to compensation as hard labor agent, unless there be a Local Act to the contrary.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 11, 1929.

The State Superintendent of Education,
Montgomery, Alabama.

A child under six years of age cannot be legally admitted into a public school in the State of Alabama.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 20, 1929, is acknowledged.

You request my opinion upon the following:

1. May children under six years of age be admitted to the public schools of Alabama?

2. If children under six years of age may be admitted on the order of the City or County Board of Education, is it mandatory that tuition be charged such under-age children?

3. If children under six years of age may be and are admitted to school on order of County or City Board of Education, should attendance of such children be included in the average daily attendance of schools in reckoning the distribution of the equalization fund as set forth in Sections 15, 16, and 17 of House Bill No. 318, pp. 301, 302, and 303, of the Alabama School Code, 1927?

In reply will say that for authority to admit anyone to the public schools of this State, you must examine the Constitution and statutes of the State. If such authority cannot there be found then it does not exist. The authority must be found written in either the Constitution, or in statutes not in conflict with the Constitution.

I have been able to find no such authority. I, therefore, give it as my opinion that a child under six years cannot legally be admitted into any of the public schools of this State.

In my opinion, such authority could not, even by the Legislature, be left to the discretion of any person or board. The right to enter a public school must be the same for all children, of the same classification, everywhere in the State. The right to admit cannot be left to the discretion of any person or board. If a given child falls within the class that have the right to enter, he can enter. If it does not fall within a class that has the right to enter, it cannot enter and no person or board can legally allow it to enter.

The foregoing answers all of your questions.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 14, 1929.

The Judge of Probate,
Clanton, Chilton County, Alabama.

Courts of county commissioners—Compensation of members for services in connection with road work.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of October 7, 1929. You state that the Commissioners Court made the following order at its July, 1929, term:

"It is ordered by the court that each county commissioner work with the road machine in their respective road district, for the month of July to push the work with said machines."

You request my opinion:

Under the above order would it be legal and a proper charge against the county to work twenty days during the month of July, under said order at \$3.00 per day and .70 mileage; the nature of the work done by said commissioner being of a general nature with the road machine, and the commissioner taking the place of a regular hand with said road machine?

In my opinion a member of the Commissioners Court cannot legally be paid for services performed by him in the manner stated above.

Section 5024, Code of Alabama, 1923, forbids a member of the Court of County Commissioners taking any contract for work or services of the county, or being employed in any way under such contract.

Section 6771, Code of Alabama, 1923, provides that each member of the Court of County Commissioners shall be paid the sum of three dollars per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building, or repairing, of any county bridges, or county buildings or works, and five cents per mile for each mile necessarily traveled by them in so doing. Said Section 6771 contains the only authority for compensating members of Courts of County Commissioners or Boards of Revenue for their services in connection with road and bridge work. In my opinion, the provisions of said Section 6771, to which I have referred, authorize members of the Commissioners Court or Board of Revenue to be paid for the letting out, inspecting and accepting, the building, or repairing, of any county bridges, county buildings or works, and, in my opinion, said provisions do not authorize members of Courts of County Commissioners or Boards of Revenue to engage in the actual work of building or repairing. A careful reading of said Section 6771 discloses that the members of the Commissioners Courts or Boards of Revenue are not authorized by it to perform any services other than that of a supervisory nature, that is to enter into contracts for building and repairing, and to inspect the work during and after completion to ascertain if it has been properly done.

I rendered an opinion on February 20, 1926, to the Judge of Probate of Jackson County, (Vol. 1, Opinions of Attorney General, 1926, p. 96), in which I held that a member of a Commissioners Court cannot be employed as road supervisor without violating Section 5024, Code of Alabama, 1923.

I rendered an opinion on November 3, 1927, to the Judge of Probate of Cleburne County, (Biennial Report of Attorney General, 1926-28, p. 351), in which I held that a road supervisor cannot employ a member of the Commissioners Court to superintend road work or to work on the roads.

I rendered an opinion on November 2, 1928, to the Chief Examiner, Department of Examiners of Accounts, (Vol. 8, Opinions of Attorney General, 1928, p. 181, office edition), in which I held that a member of the Commissioners Court cannot be paid for inspecting road and bridge work unless

the Commissioners Court makes an order authorizing the specific work at a specific time.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 14, 1929.

Judge of Probate,
Scottsboro, Jackson County, Alabama.

Juvenile Court—How Sheriff fees are paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 10th in which you state that you are having many cases coming up under the juvenile delinquency law. You also state that the Sheriff has filed a claim with the Court of County Commissioners for the costs of the arrest and feeding prisoners who come under this law.

You request my opinion:

How is the Sheriff paid for this service?

In answering the above I call your attention to Section 3558, Code of Alabama, 1923, which says among other things that the Sheriff shall be paid for this service in the manner he is paid for like services in the Circuit Court. This Section reads as follows:

"Officer Serving Process, etc., Under Juvenile Courts; Costs and Fees Of.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 15, 1929.

Hon. G. W. Wilson,
Assistant Examiner of Accounts,
CAPITOL.

Alabama Athletic Commission—The Chairman of the Alabama Athletic Commission cannot, at the same time, hold the office of Circuit or County Solicitor; such being within the inhibition of Section 280 of the Constitution of 1901.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 4th in which you inquire whether or not the Board of County Commissioners was within its rights in paying the salary of the County Solicitor of Crenshaw County after said Solicitor accepted the appointment of Chairman of the Alabama Athletic Commission.

It is well settled that both Circuit Solicitors and County or Deputy Solicitors held an office of profit under the State of Alabama.

Biennial Report 1926-1928, p. 105.

Section 280 of the Constitution of Alabama, 1901, prohibits any person from holding "two offices of profit at one and the same time under this State" with the exception of Justices of the Peace, Constables, Notaries Public, and Commissioners of Deeds, unless otherwise provided for in the Constitution.

The only question left to consider is whether or not the Chairman of the Alabama Athletic Commission holds an office of profit under the State of Alabama within the meaning of the above constitutional provision.

Section 5251 (2) provides for the creation of an Athletic Commission to be known as the Alabama Athletic Commission. Said Commission is to consist of a Chairman and two Commissioners, each of whom shall be appointed by the Governor. The Chairman is to be appointed for a term of six years. It further provides that the Chairman and the Commissioners shall take the same oath of office and may be impeached and shall be commissioned as other State officers.

Although Section 5251 (4) provides that each member of the Commission shall serve without a salary, it further provides that the Chairman of the Commission shall be ex officio recorder of permits and licenses **and for his services as such shall receive one-third of all the monies collected.**

In my opinion the Chairman of the Alabama Athletic Commission is an office of profit under the State of Alabama. His term of office is fixed, he takes the same oath of office, and may be impeached, and is commissioned, as other State officers. He also receives compensation from the State for his services, although no set salary is fixed.

State ex rel Glenn vs. Wilkinson Jan. 24, 1929, 6th Div. p. 250 (2nd Rehearing now pending),

State ex rel Horne vs. Wilkinson June 27, 1929, 6th Div. p. 373.

"If the holding of two offices by the same person, at the same time is inhibited by the Constitution or the Statute, a forbidden incompatibility is created similar in its effect to that of the common law, and as in the case of the latter, it is well settled by an overwhelming array of authority that the acceptance of a second office of the kind prohibited operates, ipso facto, to absolutely vacate the first office. It is the acceptance and qualification for the second office which vacates the first."

Biennial Report 1926-1928, p. 105.

In conclusion I wish to state that in my opinion, the Solicitor of Crenshaw County, who was elected at the last November election, ipso facto, vacated said office upon his accepting the office of Chairman of the Alabama Athletic Commission, and that the Court of County Commissioners was not within its rights in paying his salary as County Solicitor after said acceptance.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 15, 1929.

Superintendent of Education,
Scottsboro, Jackson County, Alabama.

Schools—Payment of notes executed by County Board of Education for teachers salary and other expenses.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of September 17, 1929, in which you refer to an opinion which I rendered on July 15, 1929, to the Chief Examiner, Department of Examiners of Accounts. This opinion relates to certain loans obtained by the Board of Education of Jackson County. You refer to the fact that I held that the note for \$6,500.00 to the First National Bank of Stevenson and the note for \$13,400.00 cannot be paid from funds other than current funds without violating Section 130 of the School Code of 1927.

You request my opinion:

- 1st. Is there any legal way to pay the above note?
- 2nd. If the County Board of Education by proper resolution orders you to pay these two notes on the payroll and you do so, are you and your bondsmen liable in case of suit?
- 3rd. In the event judgment is obtained in the Circuit Court against the County Board of Education on the above two notes are you safe on

placing them on the payroll or would it be best to carry the case to the Supreme Court?

In my opinion there is no legal way to pay the above notes.

In my opinion if you place the above notes on the payroll you and your bondsmen will be liable in the event suit is filed.

If a judgment is obtained in the circuit court, in my opinion you should carry the case to the Supreme Court.

In my opinion of July 15, 1929, to the Chief Examiner, Department of Examiners of Accounts (Vol. 13, Opinions of Attorney General, 1929, page 102), I held that the funds accruing for the support of schools in the subsequent year other than from the three mill county school tax and the three mill district school tax, cannot be legally used to pay debts which accrued during the former school year without violating Section 130, School Code, 1927. After a careful consideration of Section 130, School Code of 1927, and the opinion in the case of Heustess vs. Hearin, 104 So. 273, I am of the opinion that if money is borrowed to pay the salaries of teachers it must be paid within the school year in which such loans are made, unless based upon county or district tax proceeds.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 15, 1929.

The Judge of Probate,
Fort Payne, DeKalb County, Alabama.

County's part of motor vehicle tax should be credited to the general fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 21, 1929, in which you state that as Judge of Probate of DeKalb County you desire to know where the county's part of motor vehicle privilege tax should be credited.

You request my opinion:

Does this belong to the county road and bridge fund or does it go into the general fund of the county?

Section 23 of the Revenue Law of 1923, p. 251, provides as follows:

"Section 23. The money collected as motor vehicle license taxes, less all the expenses necessary or incident to the collection of such taxes including the printing and distribution of assessment blanks, blank receipts and license blanks, shall be distributed as follows: Eighty per

cent (80%) to the State and twenty per cent (20%) to the incorporated city or town in which the owner of the motor vehicle resides, and twenty per cent (20%) to the county, if the owner of the motor vehicle resides outside of an incorporated city or town. The money collected as motor vehicle license taxes by the State, less expenses, shall be used exclusively to create a sinking fund for the prompt and faithful payment of the principal and interest on good road bonds and for construction, maintenance and improvements of public highways, roads and bridges, as required under provisions of Article XX of the Constitution of Alabama."

This Section provides, among other things, that the State's share of the special license tax levied on motor vehicles "shall be used exclusively to create a sinking fund for the prompt and faithful payment of the principal and interest on good road bonds and for construction, maintenance and improvements of public highways, roads and bridges, as required under provisions of Article XX of the Constitution of Alabama," but is silent as to the county's share of such license tax, and I am unable to find any statute or law designating where the part of this fund which goes to the county shall be credited. Therefore, the law being silent as to this, then it must of necessity go and be credited to the general fund of the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 16, 1929.

The Judge of Probate,
Roanoke, Randolph County, Alabama.

Drug store—License to operate does not carry right to operate news stands.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have a letter from the Trent's Pharmacy Company of Roanoke, Alabama, dated October 3, 1929, in which they state that they operate a drug business in the Town of Roanoke, Alabama, and in connection with said business handle newspapers, magazines and other periodicals.

You request my opinion:

Is this concern due a license for operating what is commonly known as a news stand.

It is my opinion that they are under Schedule 128, Revenue Laws of Alabama, 1929. This Schedule is as follows:

"Schedule 128. News stands.—For each person operating a news stand for sale of newspapers, magazines and periodicals, five dollars."

The fact the Trent Pharmacy Company does a drug business does not exempt it from the license tax required for operating a news stand.

Report of Attorney General, 1922-24, p. 116.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 6, 1929.

The State Tax Commission,
CAPITOL.

License: Construing Section 127 of the Revenue Act of 1919.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of September 16, 1929, in which you state that:

"There is a concern in Montgomery which does bottle non-alcoholic soft drinks but which does not use carbonic acid gas or carbonated water. We understand they will bottle several drinks, one of which, for instance, will be a chocolate and milk drink and the other drinks will be of like character. In bottling these soft drinks, the firm will make use of the same type of machinery including capping machines as is made use of by those who bottle carbonated soft drinks."

You request my opinion:

Is the concern above described liable for a license tax under Schedule 127 of the Revenue Act of 1919, (Acts 1919, p. 438)?

Section 127 of the Revenue Act of 1919 (Acts 1919, p. 439) reads as follows:

"Schedule 127. BOTTLING DRINKS:—For the business of bottling non-alcoholic, or other carbonic drinks, as follows:

"(a) For every foot power crowning machine operated at any time during a license year, fifty dollars per annum, and one hundred dollars per annum for every additional machine. **(b)** For every automatic crowning machine of smallest type, having a capacity of two foot power machine, operated any time during a license year, one hundred and seventy-five dollars per annum. **(c)** For every automatic crowning machine of the intermediate type having a capacity of four foot power machine, and operated at any time during a license year, three hundred and seventy-five dollars per annum. **(d)** For every automatic crowning machine of the largest type having a capacity of six foot power machine operated at any time during the license year, five hundred and seventy-five dollars per annum. **(e)** For every automatic crowning machine of any other size or type operated at any time during a license year, fifty

dollars per annum for the first foot power capacity, and an additional one hundred dollars for each additional foot power capacity."

Tax laws, where there is ambiguity, are strictly construed against the taxing power.—Cooley on Taxation, Third Edition, page 453 et seq. To hold that said schedule includes the bottling of drinks, other than carbonic, would be more than reversing the above stated rule of construction, as the literal meaning of the language used does not include any except carbonic drinks. I am, therefore, of opinion that said Schedule 127 has no application to the case stated by you.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 17, 1929.

Clerk of the Circuit Court,
Pell City, St. Clair County, Alabama.

Distilling—When one is indicted for distilling and pleads guilty and is fined one hundred (\$100.00) dollars and given a suspended sentence of six months, the seizure fee of fifty (\$50.00) dollars does not attach. Said fee attaching only when one is convicted of violating Section 4656 of Code of Alabama, 1923, same being a felony carrying a minimum sentence of not less than a year in the penitentiary.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 17, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not a seizure fee of fifty (\$50.00) dollars attaches when one is indicted for distilling and pleads guilty and is fined one hundred (\$100.00) dollars and sentenced to hard labor suspended pending good behavior until first day of next court?

Section 4656 of the Code of Alabama, 1923, provides as follows:

"It shall be unlawful for any person, firm or corporation in this State to manufacture, sell or give away, or have in possession, any still, apparatus, appliance or any device or substitute therefor, to be used for the purpose of manufacturing any prohibited liquors or beverages."

Section 4658 of the Code of Alabama, 1923, makes the violation of the above act a felony and fixes the punishment at not less than one year in the penitentiary nor more than five years.

Section 4659 of the Code of Alabama, 1923, provides for a fifty dollar fee to be allowed the sheriff or any other person who furnished evidence and brought about the conviction for violation of the above act. It also provides

that such person to be entitled to the \$50.00 fee shall satisfy the presiding judge that he is the person entitled to said sum and shall receive from the judge a certificate to that effect.

There has evidently been an irregularity of procedure in the above case. If the defendant pleaded guilty of distilling, the minimum sentence would be not less than a year in the penitentiary. In such a case the seizure fee would attach as one is termed convicted whether he pleads guilty or is found so by judge or jury. But in the above case the defendant was fined one hundred (\$100.00) dollars and given a suspended sentence of six months, showing that he pleaded guilty to attempting to commit the felony of distilling or some other misdemeanor. I am able to find no act which provides for a seizure fee for the conviction of one for a misdemeanor.

I am, therefore, of the opinion the seizure fee of fifty (\$50.00) dollars does not attach where the defendant was sentenced for committing a misdemeanor in regard to distilling, regardless of the fact whether the defendant pleaded guilty or was found so by judge or jury.

Opinion of Attorney General, 1926-28, p. 307.

Also Opinion June 29, 1929, Chief Examiner Accounts, Vol. 12, p. 215, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 17, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Fees collected by Probate Judge under Section 7155 of Code, to be paid to State.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of October 14, 1929, is acknowledged. You ask my opinion as to where the amounts of money collected by the Probate Judge under Section 7155 of the Code shall be paid by him.

In reply will say that in my opinion the fees provided for by said Section 7155 are to be disposed of by the Judge of Probate in same manner that the fee provided by Section 6969 is disposed of, that is, paid over to the State. It is, in my opinion, quite evident that it was the legislative intent that Section 7155 should, in the case of Co-operative Marketing Associations, take the place of Section 6969 of the general corporation law. By Section 7155 of the Code it is provided:

"The provisions of the general corporation laws of this state, * * * shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this article."

It thus appears that if Section 7155 is not in conflict with or inconsistent with said Section 6969, then such associations must also pay the fee provided by Section 6969. It will be noticed on reading each of said sections that the amounts required to be paid is to be paid at the time of filing the certificate or articles of incorporation. Hence, I conclude that the ten dollar fee provided by Section 7155 when a certificate or articles of incorporation is filed by a cooperative association is to take the place of the one dollar for every one thousand dollars of the proposed capital stock, but in no case less than five dollars, provided by said Section 6969 of the general corporation. The two and a half dollars for filing amendments provided by Section 7155 takes the same course.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 18, 1929.

Judge of Probate,
Mobile, Mobile County, Alabama.

Photostat Recording Machine—The Court of County Commissioners or Board of Revenue may authorize the purchase of "Photostat Recording Machine" for the use of the Probate Court for the purpose of recording conveyances, etc.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 10, 1929, in which you inquire whether or not the Court of County Commissioners or the Board of Revenue is authorized to purchase a "Photostat Recording Machine" for the use of the Probate Court, said machine to be used for the recording of conveyances, etc.

I am of the opinion that the Court of County Commissioners or the Board of Revenue is authorized to purchase for the Probate Court a "Photostat Recording Machine" which is to be used for the recording of conveyances, mortgages, etc.

The typewriter is "stationary" within the statutory requirements of an Act approved Sept. 5, 1927, (General Acts of Alabama, 1927, p. 693), and the Court of County Commissioners or the Board of Revenue must allow the probate judge reasonable expenses for a suitable typewriter or typewriters which are used exclusively in the discharge of his duties.

Opinions of Attorney General, (Biennial Report of Attorney General, 1926-28, p. 565).

An Act approved July 1, 1927, (General Acts of Alabama, 1927 p. 89) provides as follows:

"Judges of Probate are to procure at the expense of their counties, large and well-bound books, in which must be recorded in a fair hand, or by printing the same, or by the use of a typewriter, or other writing or printing, **photograph or photostat machine**, word for word, conveyances of property and all other instruments authorized to be recorded, etc."

In order to keep in step with the trend of modern times, it is essential that we use modern methods. The typewriter replaced writing by hand and the photostat machine will replace the typewriter in recording conveyances and the like. The Court of County Commissioners or the Board of Revenue is not only authorized but must allow Probate Courts typewriters for all necessary purposes. The recording is a necessary purpose. Reasoning by analogy it would seem that the photostat machine and the typewriter are of the same class in this respect. Since the typewriter is classified as "stationary", I am of the opinion that photostat machines should be likewise so classified, so as to come within the purview of an Act approved Sept. 5, 1927, (General Acts of Alabama, 1927, p. 693), referred to above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 19, 1929.

The Judge of Probate,
Prattville, Autauga County, Alabama.

When a person, otherwise qualified to vote, fails to pay his poll tax by February 1st of any year, he thereby bars himself from voting at any election held prior to February 2nd. of succeeding year.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of October 10, 1929, is acknowledged. You make the following statement of facts:

A person fails to pay poll tax by February 1st, and the judge of probate, for that reason, leaves his name off the list of qualified voters compiled by him in such calendar year after such February 1st.

You request my opinion:

Whether or not, in the event an election is held after October first of the same calendar year or prior to February first of the succeeding calendar year, such person can qualify himself to vote at such election by paying up all poll taxes due after such October first?

In reply will say that he cannot. Section 178 of the Constitution of the State of Alabama, provides:

"To entitle any person to vote at any election by the people, he shall have resided in the State * * * and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one and for each subsequent year."

It is clear from the foregoing provision in the Constitution that when a person fails to pay all poll taxes due by him by February first of any year, he is thereby barred from voting at any election held prior to the 2nd day of February of the succeeding year.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 19, 1929.

Hon. W. O. Green,
Member, Board of Registrars,
Monroeville, Alabama.

A person not entitled to be registered before reaching twenty-one years of age.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of October 16, 1929, is acknowledged. You wish my opinion as to whether or not a person who is not twenty-one years of age at the time he or she makes application to register as an "elector", but who will be twenty-one years old before the next general election, is entitled to registration.

In reply will say by Section 177 of the Constitution, for a person to be an "elector" he must be twenty-one years of age; by Section 178 of the Constitution to be entitled to vote a person must have been registered "as an elector." This clearly means that only an "elector" can be registered. To be an elector one must be twenty-one years of age. When one has registered as an elector, the registration is decisive of the fact that he is twenty-one years of age, and has the right to vote at any election held after his registration so far as age is concerned. Should a special election by the people be called at any time after his registration, but before the next general election, if registered as an elector, he or she would have the right to vote at such election, so far as age is concerned; since registrars have no authority to register anyone except an elector, and they must register him or her as an elector. When registered as an elector that is conclusive as to age, and his or her right to vote, at any election held by the people, begins at the date of such registration, so far as age is concerned.

Opinion of Attorney General to R. L. Mullen, Chairman, Board of Registrars, Talladega, Ala.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 23, 1929.

The Judge of Probate,
Jasper, Walker County, Alabama.

Where deeds purporting to convey real estate are executed for a nominal consideration for the purpose of perfecting the title to real estate, there is no filing tax required when offered for recordation.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 13, 1929, is acknowledged. You write as follows:

"Referring to file sent you about ten days ago including three deeds (copies) "A" "B" and "C" by L. B. Musgrove.

"Please render me your opinion as to last deed filed, "C". In your opinion does the deed "C" bear the deed or filing tax?"

In reply will say that the recitals of consideration or purpose in a deed is not controlling in every case. Whether such deed bears a filing tax depends upon the facts in the case. Section 21½ of the 1927 Revenue Act (Acts 1927, p. 163 et seq.) provides for a filing tax on deeds offered for record except "deeds or instruments executed for a nominal consideration for the purpose of perfecting title to real estate." In my opinion, the actual consideration for the conveyance, in order to fall within this exception, must be of the type of valuable considerations, but nominal as to amount. This occurs, of course, where the grantor does not claim any substantial ownership in the property which the conveyance purports to convey, but is necessary for the purpose of showing a clear title in the grantee.

Whether particular conveyance falls within this class must be determined by the judge of probate after getting all the facts. A recited amount as consideration is not controlling; as the true amount of consideration need not be recited in a deed in order to pass title.

Under the facts stated by you I am of the opinion no filing tax is due on deed "C".

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 25, 1929.

Hon. Philip Willingham,
President, Board of Revenue,
Livingston, Sumter County, Alabama.

County Board of Revenue cannot legally use any part of gasoline tax by the State for paying debts created prior to such receipt.

Tax paid by persons subject to road duty in Sumter County, in lieu of work, by virtue of Local Act. No. 284, approved Sept. 2, 1919, becomes part of general road fund of the County and may be used in constructing or maintaining roads anywhere in the County.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of September 19th is acknowledged. You ask my opinion upon the following questions:

"1. Can the Board of Revenue use any part of the gasoline tax for the purpose of paying the debts created prior to January 1, 1929, and during the year 1928 for maintaining and repairing roads? These debts were created for the purpose for which the gasoline tax is given in the counties and were in excess of the amount received by the county from the gasoline tax for the year 1928.

"2. Can any portion of the gasoline tax received during the remainder of this year be used for debts created in the early part of the year for repair and maintenance of roads?

"3. Can the per capita tax in lieu of road duty, received under the Local Acts 1915, as amended by Local Acts approved September 2, 1919, be used to pay the above debts, or should it be applied to working and maintaining the roads? Can this per capita tax be used outside of the precinct where collected?

"4. In the event any or either of the above taxes can be used to pay said debt, can any portion of same be set apart by the Board for that specified purpose?"

In reply to your first question will say that the part of the two cent gasoline tax collected by the State and distributed to your County cannot be used when received for the purpose of paying debts previously contracted for any purpose. I am enclosing copy of opinion rendered by me to the Chief Examiner of Accounts, which fully sets out my views with reference to the expenditure of said gasoline tax.

What is said above also answers your second question.

In answer to your third question will say that, in my opinion, the tax collected from persons subject to road work, in lieu of such work, constituting part of the road fund of your county—Local Acts 1919, No. 284, p. 101—may legally be used to pay debts created as stated in questions one and two. Being part of the road fund of the County, it can be used anywhere in the County.

If what is said in the last above does not answer your fourth question then I do not understand your question.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 30, 1929.

Hon. George A. Loffin,
Member, Court of County Commissioners,
Route 1,
Goshen, Pike County, Alabama.

The two cent gasoline tax collected by the State and distributed to the counties cannot be dealt with in any way prior to its receipt by the County; and, after receipt, it can be used only as provided in Section 83 of Act No. 172, approved August 22, 1923.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of October 29, 1929. You make the following statement of facts:

On or about October 1, 1929, there was distributed to Pike County by the State from the two cent gasoline tax collected by the State approximately \$5,200.00.

You wish my opinion as to whether or not any part of this \$5,200.00 can legally be used to pay debts incurred during the month of September, 1929, or during any month previous thereto for the maintenance and repair of roads and bridges.

The answer to your question requires consideration of Section 83 of Act No. 172, approved August 22, 1923, (Acts 1923, p. 197). This Section reads as follows:

"Section 83. That the net proceeds of the excise tax on gasoline or other liquid motor fuels in this State prescribed by an act of the Legislature of Alabama, entitled, An Act "imposing an excise tax on persons, corporations, co-partnerships, companies, or associations engaged in the business of selling, or distributing gasoline, or other liquid motor fuels in this State, providing for the collection and payment of such tax and the distribution of the funds derived therefrom and fixing the penalties for the violation of any of the provisions of this Act" approved February 10th, 1923, after payment of all costs and expense of administration and collection which amount shall not exceed twelve thousand dollars per annum, shall from and after the first day of October, 1923, next after the passage of this act be divided and distributed equally among the sixty-seven counties of this State to be collected and paid to each of the several counties as provided by the provisions of that act. Provided that all

the funds derived by the several counties from said tax shall be expended exclusively for maintenance and repair of roads, highways and bridges in said counties. The use or expenditure of any of said funds in any other manner or for any other purpose than as provided herein, by the governing body of any county or any individual member of said body shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail or at hard labor for the county for not less than one nor more than twelve months. The Chief Examiner of Public Accounts is hereby specially charged with the duty of examining into and determining each year whether or not said funds have been used or expended as herein provided. Whenever said Examiner of Public Accounts discovers a violation of any provision of this section he shall forthwith report same to the Attorney General whose duty it shall be to direct the prosecution of said offense."

From the foregoing it will be seen that the Court of County Commissioners can deal with the "funds derived" by the County, only, and not with the funds to be derived by the County. Hence, there can be no pledge of these funds for any purpose. This fund after having been received by the County "shall be expended exclusively for maintenance and repair of roads." This precludes the idea of expending it for payment of debts incurred prior to receipt of such funds.

The Legislature intended that this fund to be paid over by the State to the County each month should be available for current "maintenance and repair of roads, highways and bridges" of the County. Otherwise, disaster to roads and bridges might come and there would be no funds available to make the roads passable. It was to prevent such a situation that the Legislature provided this fund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 2, 1929.

Hon. W. A. Tillman,
Member, Court of County Commissioners,
Troy, Pike County, Alabama.

County which has exceeded constitutional debt limit not authorized to contract for services of county health officer, etc.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of October 31, 1929. You request my opinion:

Pike County having exceeded the limit of indebtedness fixed by the Constitution, is there any authority of law for the Commissioners Court

to enter into a contract for the payment for services of the County Health Officer, Farm Demonstration Agent, Child Welfare Worker, or Home Economics Agent?.

In my opinion there is no authority of law for the above contracts. I am enclosing herewith copy of an opinion which I rendered on September 23, 1929, to the Judge of Probate of Pike County. Said opinion contains the reasons for the above ruling.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 12, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

County Board of Education—Apportionment of school' funds.
County Board of Education—Payment of debts.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of October 31, 1929. You state that at the close of the scholastic year, ending June 30, 1929, it was found that the County Board of Education of Tuscaloosa County in preparing the budget for the distribution of school funds in said county had set apart the sum of \$23,828.48 for the support of the city schools of Tuscaloosa. You also state that the County Board of Education did not attempt to borrow money and pledge the future collections of the county wide three mill tax and the scholastic year, ending June 30, 1929, closed with the above amount due the City of Tuscaloosa. You also state that no temporary loan was made during the scholastic year which ended June 30, 1929, to liquidate the above indebtedness, but that since the beginning of the new scholastic year the County Board of Education has undertaken to satisfy the debt in part by making a temporary loan by executing a note to the bank for \$19,000.00; this note to be paid during the present scholastic year and out of current funds.

You request my opinion:

1. Has the County Board of Education authority to incur any debt subsequent to October 1, 1927, except such debts as might be created under authority of Section 130 of the School Code of Alabama of 1927, and such debts as might be made by borrowing money to pay debts which were incurred prior to October 1, 1927?
2. Is there any law to authorize the County Board of Education to negotiate temporary loans to pay debts created during the past scholastic year and pledge the current funds of this scholastic year for payment of such loans?

3. Is there any law which authorizes the County Board of Education of Tuscaloosa County to pay the debt due to the City of Tuscaloosa?

4. After the above funds were set apart by the County Board of Education as distributed to the schools in the City of Tuscaloosa, could any part of such funds be legally used by the County Board of Education except for the purpose for which it was distributed?

5. Does Section 136 of the School Code of 1927 authorize the creation of debts after October 1, 1927, and does it authorize the payment of debts created after October 1, 1927?

6. Does the County Board of Education have authority to pay any debt created during a scholastic year, after such scholastic year has ended, out of funds of the succeeding scholastic year, by the issuance of county warrants pledging the three mill county wide school tax, bearing in mind that these debts were created after October 1, 1927?

1. In my opinion your question numbered one must be answered in the negative.

2. In my opinion there is no law which authorizes the County Board of Education to negotiate temporary loans to pay debts created during the past scholastic year and pledge the current funds of this scholastic year for the payment of such loans.

3. In my opinion your question numbered three must be answered in the negative.

4. In my opinion the County Board of Education had authority, after the above funds were set apart by the Board of the City Schools of Tuscaloosa, to use a part of said funds for other purposes if the Board found such action necessary in administering the school laws of the county.

5. In my opinion Section 136 of the School Code of 1927 does not authorize the creation of debts after October 1, 1927, nor does it authorize the payment of debts created after October 1, 1927.

6. In my opinion the County Board of Education does not have authority to pay any debt, created during a scholastic year, after such scholastic year has ended, out of funds of the succeeding scholastic year, by the issuance of county warrants pledging the three mill county wide school tax.

I have considered the provisions of Sections 130, 136 and 319 of the School Code of 1927. I have also considered the opinions in the following cases:

Kimmons v. Jefferson County Board of Education, 85 So. 774.

Heustess vs. Hearin, et al., 104 So. 273.

State ex rel King, et al., v. County Board of Education of Russell County, 108 So. 588.

Section 130, School Code of 1927, gives the County Board of Education authority to borrow money to pay teachers' salaries and current expenses. Said section provides that all such current loans, except such as are based on

county and district local tax proceeds, shall be paid from funds accruing for the support of the schools within such given school year.

Section 136, School Code of 1927, confers authority on the County Board of Education to borrow money to pay debts incurred or created, which are unpaid, and such as may be incurred or created to the first day of October, 1927, and may issue warrants therefor. You will observe that the School Code of 1927 went into effect on October 1, 1927, (School Code 1927, p. 21). It is clear, therefore, that Section 136, School Code of 1927, authorized the borrowing of money to pay debts created prior to October 1, 1927, but does not authorize the borrowing of money to pay debts which were created after October 1, 1927.

Section 319, School Code of 1927, provides that any educational fund becoming available at any time during a scholastic year may be used to pay any obligation incurred during said scholastic year.

The above case of *State ex rel King, et al., v. County Board of Education of Russell County*, contains the following:

"County Boards of Education have much discretion in the apportionment of school funds for which a court's discretion cannot be substituted."

A reading of the opinions in the above cases and consideration of the above sections of the School Code of 1927, discloses that the County Board of Education has broad authority in the apportionment of school funds. In my opinion, if the County Board of Education apportioned school funds to the city schools of Tuscaloosa but later found that all of said funds were not needed for the operation of the city schools of Tuscaloosa, the County Board of Education could use a part of said funds for other purposes.

I rendered you an opinion on July 15, 1929 (Vol. 13, p. 102, office edition) in which I held that in my opinion all loans authorized by Section 130, School Code 1927, except such as are based on the county three mill tax or the district three mill tax are payable out of the funds accruing for the support of schools within such given school year and none other.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 16, 1929.

Clerk of the Circuit Court,
Fort Payne, DeKalb County, Alabama.

Bond on Appeal from Circuit Court to Court of Appeals—where sentence is suspended and bond is fixed and approved, the appeal is perfected and Circuit Court loses jurisdiction.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 11, 1929, in which you submit the following statement of facts:

"This defendant was convicted August 21, 1929, for transporting more than 5 gallons of intoxicating liquors. He filed an appeal that day, and the court entered an order suspending the sentence pending the appeal and fixed the appeal bond at \$4,000.00. Defendant made the bond, and was given his liberty. Several days ago, one of the sureties on the appeal bond delivered the defendant over to the sheriff. The defendant now presents another bond for the sum of \$4,000.00, which is in my opinion, sufficient, and which bond is conditioned as required by law. I am advised by the Circuit Judge, Hon. A. B. Hawkins, that as the appeal is pending in the Court of Appeals, he has no authority to make an order as to a new bond. The defendant takes the position that as the Court set the amount of bail when the appeal was taken, that original order is sufficient authority for my accepting a new bond."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Whether or not the original order of the Court fixing the amount of bail at \$4,000.00 pending the appeal, is sufficient authority for me to approve this new bond after the defendant has been surrendered on the original bond?

I am of the opinion that where a person is convicted in the Circuit Court, and sentence is suspended pending appeal, and the court fixes the amount of the appeal bond, the defendant makes bond and the bond is approved by the clerk, the appeal is perfected.

After defendant has appealed in a criminal case, the Circuit Court is without jurisdiction to grant and fix bail. In other words the Circuit Court loses jurisdiction when the appeal is perfected. Should the defendant have any right to give a new bond, he must proceed in the Court of Appeals and not in the Circuit Court.

State v. Williams, 19 Ala. App. 597.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 19, 19*9

Alabama State Bridge Corporation,
Montgomery, Alabama.

Alabama State Bridge Corporation: Bonds issued by said corporation in pursuance to Act of the Legislature, 1927, not subject to State Capital Stock tax.

Opinion by Assistant Attorney General Smith.

Gentlemen:

I have your letter of October 29, 1929, in which you request the opinion of the Attorney General on the following question of law:

Whether or not the bonds issued by the Alabama State Bridge Corporation are exempt from state capital stock tax?

The Supreme Court of Alabama in an advisory opinion to the Governor of Alabama, held that the Alabama State Bridge Corporation created by the Legislature of Alabama, 1927, was a valid Enactment and that said corporation as an arm of the State Government. Section 5 of the Act of the Legislature, 1927, page 280, provides that the notes or bonds of said Corporation "shall be free from taxes of all kinds in the State of Alabama."

I am, therefore, of the opinion that said bonds so issued by the Alabama State Bridge Corporation are not subject to the state capital stock tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 19, 1929.

The Superintendent of Insurance,
CAPITOL.

Under the facts as stated in the opinion, it is not necessary for the Union Insurance Company to qualify in Alabama or otherwise comply with the laws of Alabama, since it does no business in Alabama.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of November 6th with attached blank insurance contracts, is acknowledged. You make the following statement of facts:

The Lumbermen's Reciprocal Association of Houston, Texas, a corporation under the laws of the State of Texas, is qualified to do business in the State of Alabama. It does in the State of Alabama, what is termed a reciprocal insurance business. It issues policies to, what are called in the policy, subscribers. The subscriber pays a premium for this policy or

contract. There is attached to the policy or contract, as part thereof, a written guaranty to the subscriber, executed by the Security Union Insurance Company, a corporation under the laws of the State of Texas, against all additional assessments for which such subscriber, or policy holder, might be assessed under the terms and conditions of the attached policy issued to the subscriber or policy holder by the subscribers at Lumbermen's Reciprocal Association, Houston, Texas. This contract is paid for in the State of Texas to said Security Union Insurance Company by said Lumbermen's Reciprocal Association, but costs the policy holder in Alabama nothing in addition to the premium on his policy from the Lumbermen's Reciprocal Association. Said Union Insurance Company has never qualified to do business in the State of Alabama.

The Lumbermen's Reciprocal Association complies with all the laws of Alabama. It is a casualty insurance company.

You wish my opinion, as to whether or not, under the facts stated it is necessary for said Security Union Insurance Company to qualify to do business in this State and then comply with the provisions of Section 289 of the insurance laws of Alabama as compiled by Russell P. Coleman, June 1, 1929.

In reply will say that, in my opinion, under the facts stated, there is no such necessity. There is nothing done by said last named Company in the State of Alabama. No premium is paid to it by anyone in the State of Alabama. The contract of guaranty issued by it to the policy holder in Alabama is but the performance of a contract entered into by and between the two named Texas corporations in the State of Texas.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 19, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Scire facias, or notice of judgment nisi; should be issued by the clerk of the court and placed in the hands of the sheriff for proper service.

Sheriff must make return on or before date fixed in the notice.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 7, 1929, in which you request the opinion of the Attorney General on the following questions of law:

If the License Inspector institutes a case by arrest and the case is properly docketed, is there any law which requires the clerk of the court

to deliver all papers, such as subpoenas, capiases, etc. to the License Inspector for service, or has the clerk the option to turn such papers over to the Sheriff or License Inspector as he sees fit?

I am of the opinion that where a defendant has been arrested by a License Inspector, the case properly docketed and the bond approved, the only other duty to be performed by the License Inspector is to appear as a witness against the defendant. When the defendant forfeits his bail, the court should issue an alias warrant for the arrest of the defendant, which may be served by any lawful officer of the State. This would include a License Inspector. When a defendant forfeits his bail, the court must render a conditional judgment against the bondsmen in favor of the State for the amount of the bond as provided in Section 3388 of the Code of Alabama, 1923.

Section 3389, of the Code provides that upon the rendition of such judgment, notice must be issued by the clerk to each defendant.

Section 3390 of the Code provides that notice of a scire facias should be executed and returned by any sheriff in the State.

Therefore, after considering the above referred to sections of the Code of Alabama, it is obvious that it is the duty of the clerk to place the scire facias in the hands of the Sheriff for service and proper return thereon endorsed, on or before the day fixed or specified in the notice.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 21, 1929.

Mr. J. T. Maddox,
Assistant Examiner of Accounts,
CAPITOL.

1. The right to mine coal, or other mineral from land, is an interest in the land and a conveyance of such interest must be effected by deed.
2. Such deed when filed for record requires the payment of the filing tax as provided by Section 21½ of Act No. 163, approved August 22, 1927, (Acts 1927, p. 163).
3. There was no deed filing tax prior to October 1, 1923. Deeds filed from October 1, 1923, to October 1, 1927, are governed by the 1923 Act, while deeds filed since October 1, 1927, are governed by the 1927 Act as to filing tax.
4. The deed filing tax is measured by the reasonable cash value of the property, or interest in property, conveyed by the deed filed for record.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of October 16, 1929, addressed to Hon. Chas. E. McCall,

Chief Examiner of Accounts, with copies of the following instruments in writing:

One of date June 15, 1927, from May Jones Miller to Moffatt Coal Company; one of date November 1923 from Norman S. Walker, Jr., et al to James M. Donaldson et al; one of date August 20, 1921, from Henry C. Powers and wife to Bonnie Coal Company; one of date April 2, 1922, from Henry C. Powers and wife to Moffatt Coal Company; and one of date October 17, 1927, from Bonnie Coal Company to J. C. Martin, is hereby acknowledged.

You wish my opinion as to whether or not a filing tax was due on filing for record each of said instruments and, if so, what amount.

Each of said instruments conveys the right to extract from the earth and become owner of the mineral extracted from certain lands named therein for a consideration named therein. Such instruments are not mortgages in any sense of the word and, hence, did not require a mortgage filing tax. Is each of said instruments a deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property? If so, then if filed for record on or after October 1, 1923, a deed filing tax due. The first deed filing tax went into effect October 1, 1923.

Act No. 301, approved Sept. 14, 1923, (Acts 1923, p. 319).

Each of these instruments in writing convey an interest in the land therein described. The right to dig and carry away ore from the land of another is an incorporal hereditament or easement and any contract for the sale of such right, to be binding in the law, under the statute of frauds, must be in writing and the conveyance of such right must be by deed.

Riddle v. Brown, et al. 20 Ala. 412.

Milliken v. Faulk, 116 Ala. 658.

Thomas v. Janue, 32 Ala. 727.

Rhodes v. Olis, 33 Ala. 600.

Union Stave Co. v. Smith, 116 Ala. 424.

Tillis v. Treadwell, 117 Ala. 449.

Such being the law it is my opinion that they each fall within the class of instruments requiring a deed filing tax. Whether a deed filing tax was due when presented for record depends upon when each was presented for record. If recorded before October 1st, 1923, no filing tax was due, as there was no law providing for a deed filing tax up to that time. If presented for record since October 1st, 1923, a deed filing tax was due when filed, unless it falls within the exception provided in the 1927 Act, which is Section 21½ of Act No. 163, approved July 22, 1927, (General Acts 1927, p. 163). If filed after the 1st day of October, 1927, the filing tax is governed by the 1927 Act. This Act exempts from the tax the filing of instruments executed prior to October 1, 1923. Such was not the case with the 1923 Act. All such instruments filed for record between October 1, 1923 and October 1, 1927, are governed by the 1923 Act, which had no such exception.

The amount of the filing tax depends upon the value of the interest conveyed by the instrument. What would have been its reasonable cash value at the date of the execution of the instrument, if the transaction had been entirely for a cash consideration. This would be the measure of the tax as provided in each of said Acts—fifty cents on each five hundred dollars of such cash value or fractional part thereof.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 21, 1929.

Hon. W. A. Gayle,
Assistant Adjutant General,
CAPITOL.

The term "public monies", relative to National Guard appropriations, includes City and County appropriations as well as the regular State appropriation.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 22, 1929, in which you request opinion of the Attorney General as follows:

Whether or not the officers of the National Guard are to make an accounting for the monies received by them by means of City and County appropriations as well as the regular State appropriation. In other words does "public monies" as referred to in Section 43 of the Act entitled "To Regulate and Provide for the Military and Naval Forces of the State of Alabama, etc." General Acts of Alabama, 1927, p. 581, mean monies appropriated by the City and County as well as by the State?

In my opinion the term "public monies" used in the above cited section, refers to all monies that are appropriated to the National Guard of the State of Alabama, whether the same be by the regular State appropriation or by a City and County. Surely monies so appropriated could not be considered private funds when they are given for the public benefit and placed in hands of the National Guard officers for the benefit of their particular unit.

Yours truly,
CHARLIE C. McCALL,
Attorney General

November 27, 1929.

The Judge of Probate,
Clayton, Barbour County, Alabama.

Where a mortgagee forecloses a mortgage on land, under power of sale in the mortgage, and such mortgagee becomes the purchaser at the sale. No deed filing tax is required on the instrument executed by the auctioneer to such mortgagee purchaser.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of November 21st is acknowledged. You wish my opinion upon the following:

A mortgage is made by A to the Federal Lank Bank of New Orleans; A defaults in making payment of mortgage debt. The Federal Land Bank thereupon, under power of sale in the mortgage, forecloses the mortgage and becomes the purchaser of the mortgaged land at the foreclosure sale. By virtue of a power given by the mortgage the auctioneer executes what purports to be a deed to the mortgagee purchaser. Such deed is offered for record. Is a privilege filing tax required?

In reply will say that the opinion to Hon. Thos. Coleman, Biennial Report of the Attorney General 1922-1924, page 230, answers your question. The Act of 1927 is not different from the Act of 1923, so far as such a case is concerned. The title to the property was already in the mortgagee and the sale cut off the equity of redemption. The purported deed conveyed nothing. It was a memorial of foreclosure. Deeds which convey property or interest in property, when offered for filing must pay a privilege tax. An instrument which does not convey property, nor interest in property, does not require a deed filing tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

November 27, 1929.

Board of Revenue,
Columbiana, Shelby County, Alabama.

Fine and Forfeiture Fund: Where forfeitures have been taken conditionally and set aside, without payment of costs, against defendants and their sureties, fees of sheriff and clerk, are not a charge against fine and forfeiture fund. But if judgment is rendered against the county by the Court the officers are entitled to be paid their fees by the county.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 8, 1929, in which you state as follows:

A claim has been filed against the general funds of the county by the sheriff for serving scire facias in a State case wherein a forfeiture on a bond was taken against the defendant and his sureties, which forfeiture was subsequently set aside by the Court.

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Should this item of cost be charged against the general funds of the county or against the fine and forfeiture fund?

I am of the opinion that there is no provision of law for charging sheriffs fees in cases of forfeitures against defaulting defendants and sureties, where the forfeiture is subsequently set aside, against the fine and forfeiture funds of the county. In cases against defendants and their sureties, however, if the county is the beneficial plaintiff, and judgment is rendered against it for costs the officers are entitled to the fees incurred thereby.

Coosa County vs. Parker, 83 Ala. 269.

Attorney General's Report, 1926-1928, Vol. 12, p. 222.

The fine and forfeiture fund of the county can be charged with fees and costs only as is expressly provided by law. Section 4039 of the Code of Alabama, 1923, provides how officers may charge their costs and fees against the fine and forfeiture funds. There is no provision for a charge against such fund of the fees in cases of the character mentioned by you. The County is liable for costs and fees only to the extent and in the manner provided by law.

Tolbert v. Hale County, 131 Ala. 143.

Greene County v. Hale, 61 Ala. 72.

Yours truly,
CHARLIE C. McCALL,
Attorney General

November 30, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

When Judge of Probate accepts check as payment of license tax due State, County or City and issues the license, he is estopped from denying his liability to the State, County or City for the amount of money due each on issuing such license.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of November 25th, 1929, enclosing letter of November 22nd, 1929, to you from Hon. John S. Mooring, Assistant to State Tax Commission. You make the following statement of facts:

A person makes application to the Probate Judge for motor vehicle license and tenders the Probate Judge a check on some bank in payment of the license. The Probate Judge accepts the check as payment of the license, and issues to such person a receipt for payment of license and a tag. The check is duly presented by the Probate Judge for payment and is dishonored by the bank.

Upon the foregoing facts you wish my opinion as to whether or not the Judge of Probate, on accounting with the State, County or City is chargeable with the amount evidenced by the receipt given to such person.

In reply to your inquiry will say that the Judge of Probate has no authority to issue such receipts and tags except upon receipt of the amount of money required by the statute. When he has issued such receipt and tag, he is estopped, so far as State, County or City is concerned, from denying that he has received such money and he is bound to account to each such government for its share of such amount.

As between the tax collector and the person whose check he has accepted as money, a different rule necessarily obtains. No one can take advantage of his own wrong. The Judge of Probate, in my opinion, is in the wrong in accepting a check as money in payment of a license tax due State, County or City, and is estopped from denying his liability for the money due for issuing such license. On the other hand, the person issuing a fraudulent check, cannot, in my opinion, claim, as against the Judge of Probate, that he has paid for the license. He cannot take advantage of his own wrong.

Yours truly,
CHARLIE C. McCALL,
Attorney General

December 5, 1929.

The Judge of Probate,
Florence, Lauderdale County, Alabama.

An employee of the State Highway Department who is actually engaged in the service of the State Highway Department in the construction, maintenance or repair of the State Highways, is exempt from road duty of his respective county, provided his services are especially required in an emergency at the time for which summoned. Whether such emergency exists, rests largely within the judgment of the foreman or person in charge of the work at that period.

The certificate of the foreman need only state the fact that such person is actually engaged in the service of the State Highway Department in the construction, maintenance or repair of State highways. But this certificate must be construed to mean not only that such person is so actually employed; but, in the judgment of the foreman, an emergency exists requiring such services.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of August 20th is acknowledged. You wish my opinion upon the following:

1. Under the provisions of Section 164 of the Highway Code, 1927 (General Acts 1927, pp. 393 and 394), when a person employed by the Highway Department has been summoned to work on the public roads of the county, is a certificate from the foreman, or person in charge of the work at the time for which such person is so summoned, which states that the person summoned is "actually engaged in the service of the State Highway Department in the construction, maintenance or repair of the State highways," a sufficient certificate as provided in said Section?

2. Is it necessary that such certificate shall state that the notice for road duty has been served at a time when the services of the employee are especially required in an emergency by the State Highway Department?

3. If there should be, in fact, no such emergency and the certificate of the foreman is untrue in that respect, will the employee still be exempt from prosecution for failure to comply with notice for road service?

4. Since Section 164 providing exemption, declares expressly that employees of the State Highway Department shall perform road duty within each annual period, how may county enforcing officers prosecute an employee of the Highway Department for failure to work the road after any given notice where the employee presents such certificate from such foreman for the particular period for which such employee has been summoned,—it being understood that notices to work the county roads have been given to such employee every week during the year and that such certificate from the foreman has been presented each time by such employee.

In reply to question 1, will say that such a certificate fully and literally complies with all requirements of said Section 164.

In reply to question 2, will say that no such requirement is made in the statute.

In reply to question 3, will say that the certificate does not exempt the employee from county road duty. It is mere evidence of exemption. This evidence may be rebutted. The statute says:

"All employees of the State Highway Department, who are actually engaged in the service of the State Highway Department in the construction, maintenance or repair of the State highways shall be exempt from road duty of their respective counties."

The method of showing this fact is for the employee to present a certificate from the foreman or the person in charge of the work at that period, stating such to be the fact.

In reply to question 4, will say that, in my opinion, it was the legislative intent that road construction, maintenance and repair by the State Highway

Department shall not be interfered with by requiring its employees to work the county roads. Such an employee may be summoned at any time that he is not actually engaged in the service of the State Highway Department in construction, maintaining or repairing State highway; and, if otherwise liable to road duty, he must respond by appearing and working or by paying the alternate sum of money provided by law. The emergency referred to is when he is "actually engaged in constructing, maintaining or repairing the State highway," and his services cannot be dispensed with by the Highway Department without interfering with such work. As to the existence of such a situation, the judgment is left to the foreman under whom he is actually working. The meaning of said provision is that he is not exempt unless actually employed at the time for which summoned, and, in such work, as he cannot be spared without delay, embarrassment, or extra cost to the State Highway Department. The certificate required must be construed to mean that. That such a situation exists, rests largely in the judgment of the foreman. The duty of such employee to work the county roads is made subordinate to the necessity for his actual services by the State Highway Department.

"Actually engaged" does not mean simply being under contract with the State Highway Department, but being actually engaged doing work on the State highway under contract with the State Highway Department for the time covered by the summons.

The opinions of date October 4, 1928, to the Judge of Probate, Pickens County, and to the County Solicitor, Choctaw County, are modified and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 5, 1929.

The Judge of Probate,
Dothan, Houston County, Ala.

Judge of Probate: Where legal claim has been filed, audited and allowed by courts of county commissioners, judge of probate must issue warrant to claimant.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of October 22, 1929, in which you request the opinion of the Attorney General on the following question of law:

"If a claim against the county is properly filed and presented and apparently legal on its face and the Board of Revenue audits and orders it paid, and there are no funds with which to pay it, have I, as the chairman of the Board of Revenue, and the one who issues the warrants, any discretion in the matter if it appears to me it would be for the best interest of the county that the warrant not be issued?"

I am of the opinion that under Section 224 of the Code of Alabama, 1923, where a legal claim has been filed with the county board of revenue, audited and ordered paid, it must be registered in a book kept for that purpose; and the judge of probate must give the claimant a warrant on the treasury for the amount so allowed. This provision of law is mandatory on the probate judge and the mere fact that there are no funds to pay said claim is no concern of the probate judge issuing a warrant. The warrant, of course, cannot be paid by the treasurer unless there are funds available in the treasury for that purpose.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 5, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

1. The Judge of the County Court is without authority of law after a fine has been assessed, by subsequent order, to reduce it below the minimum set by statute.

2. The Clerk of the Court should in collecting fine and cost when presently paid the minimum fine which was originally assessed and not the amount to which said fine was reduced below the minimum by a subsequent order of the Court.

3. Where the Clerk issues execution on a confession of judgment he should include in his itemized statement of cost and fine the amount of the original fine and not the amount it was reduced to by the Court in a subsequent order if such a reduction places it below the minimum amount fixed by statute.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 8, 1929, in which you state:

"In an examination now being made in one of the Counties of the State, and in the particular examination of the Judge of Probate of said County as ex-officio Judge of the County Court, it is found that there are a number of cases where defendants were found guilty in a trial in said County of violating the prohibition law and fined the lowest fine, the sum of \$50.00.

"A further order in the judgment of said court appears in substance as follows: 'On recommendation of the County Solicitor this fine is reduced to \$10.00.'

"Similar orders appear in certain cases where defendants were convicted of violating the law with reference to carrying concealed pistols, in which cases, as you are well aware, the lowest fine is \$50.00."

You request my opinion:

1. Please advise whether or not the Judge has any authority of law to reduce said fine below the minimum of \$50.00.
2. Please advise, where there was a confession of judgment in said case and an execution was issued on said confession of judgment, whether or not it was the duty of the clerk to have set forth in his execution as an item of fine the lowest fine fixed in the judgment, \$50.00, or whether it was his duty to set forth as an item of fine \$10.00, the amount to which the Judge trying the case reduced the judgment?
3. If the fine and costs in the case were presently paid, was it the duty of the clerk to have charged the defendant with \$50.00, the lowest fine fixed by law, or the \$10.00 to which the Judge had reduced the fine?

Answering your first inquiry will say in cases where the defendant is tried under Section 3485, Code of Alabama, 1923, for carrying concealed weapons it is provided among other things " * * * the defendant may give in evidence that, at the time of carrying the weapon concealed, he had good reason to apprehend an attack, which the jury may consider in mitigation of the punishment, or justification of the offense." Under this provision when the defendant offers such evidence it has been held by our Supreme Court in the cases of *Bass v. State*, 63 Ala. 59, and *Maxwell v. State*, 39 So. 382, that the Court trying the case (without a jury) or the jury trying the case may assess a fine for an amount less than \$50.00 or may at its discretion acquit the defendant.

Report of Attorney General, (office edition, Book 8, p. 169)

We are unable to find any provision of law giving the Court the power to reduce such a fine after it has once been assessed. Where the Court tries the cases (as does the Judge of the County Court) without a jury and renders its judgment and assesses the fine of \$50.00 or more, the judgment becomes final so far as the Court's power to reduce same and he is powerless to reduce the same below the minimum fine of \$50.00.

If the defendant is being tried for a violation under Section 4621, Code of Alabama, 1923, which prohibits the selling, bartering, exchanging, giving away or possessing prohibited liquors the minimum fine under Section 4622, Code of Alabama, 1923, is \$50.00 and the maximum fine is \$500.00 and the Court when trying the case without the intervention of the jury is compelled under the law if he finds the defendant guilty to assess a fine the amount of which cannot be less than \$50.00 and is without authority of law by a subsequent order to reduce it lower. If he could do this, then he would have the power to make it less than the minimum in the first instance. Such an order is without law or reason. In the trial of all violations of what is known as the prohibition law the Court trying the case is prohibited from suspending in whole or in part and such an order is null and void and constitutes a high misdemeanor in office. In this connection I might say that I am familiar with the provisions of Section 5285, Code of Alabama, 1923, which reads as follows:

"Fines Assessed by Jury; How Remitted or Reduced.—In prosecution by indictment, the jury shall fix and determine the amount of the fine; and no judge shall remit or reduce the fine so fixed, unless he spreads his reasons for so doing in full on the minutes of the court."

It will be noted by careful reading of this Section that the Judge is without authority to carry out the provisions of this section except in cases brought into Court by indictment. The Judge of the County Court tries violations of the law which have been brought into his Court by complaint and not by indictment, therefore, the provisions of this Section does not and cannot apply to any case which may be within his jurisdiction and there is no authority for the suspension of any sentence by a Judge of the County Court for the reason as stated above he does not try cases brought into the Court by indictment.

Answering your second inquiry having reached the conclusions above set out, it is my opinion that the Clerk in issuing his executions in such cases should place the fine at the amount of the original judgment, and not at the amount to which it was reduced below the minimum by a subsequent order of the court.

Answering your third inquiry it is my opinion when such fine and cost is presently paid, the Clerk should charge up the fine of \$50.00, the amount originally assessed and not the amount to which it was reduced by the Court, as it is my opinion the subsequent order of the Court is void and therefore of no effect.

In reaching the above conclusions I am not unmindful of the fact that the Court has supervision of all judgments rendered by it for a period of thirty days after their rendition and that he could, if he should see fit, set the original judgment aside, and if he was trying the case without a jury acquit the defendant, but if he assesses a fine at all he is without authority of law to place it at an amount less than the minimum fine which is \$50.00 and is powerless to change this to a less amount by a subsequent order.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 6, 1929.

Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

County Board of Education—cannot use school funds to repair court room.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of October 29, 1929, with letter from the Judge of Probate of Dallas County to you enclosed. He states in his letter that the

Court of County Commissioners contemplate making certain repairs to the courthouse in Selma, and that the County Board of Education is willing to help pay the expense of making such improvements.

You request my opinion:

Can a County Board of Education use school funds in making improvements to a court room?

In my opinion a County Board of Education cannot use school funds for the purpose of making improvements to a court room.

Section 210 Code of Alabama, 1923, provides that county buildings are to be erected and kept in repair by the county.

There is no law authorizing the County Board of Education to use school funds for the above purpose.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 6, 1929.

Hon. J. B. Dykes,
Chairman, Board of Registration,
Clayton, Barbour County, Alabama.

Registration of voters—persons not entitled to register unless residents of the county for one year.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of November 1, 1929, in which you state that several teachers appeared before the Board of registration. You also state that some of them had taught in the city school for seven or eight months during the past winter, and that two had taught only about six weeks this fall, and did not know that they would return next year. You also state that the teachers who taught in the schools last winter returned to their homes in other counties at the close of school, and were out of Barbour County until school opened this fall.

You request my opinion:

Are the teachers mentioned above entitled to registration in Barbour County?

In my opinion, the teachers mentioned above are not entitled to registration in Barbour County, because they have not been in the county one year.

I rendered an opinion on October 26, 1927, to the Judge of Probate of Butler County, (Biennial Report of Attorney General, 1926-28, p. 337) in which I held that a person must be in the State for two years, in the county

one year, and in the precinct three months before he is entitled to registration.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 6, 1929.

Chairman, Board of County Commissioners,
Huntsville, Madison County, Alabama.

Courts of County Commissioners: Money received from sale of jail should be placed to the credit of the general funds of the county.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have received your letter of October 4th, 1929, in which you state as follows:

"On May 15th of this year Madison County sold its jail property and received a cash consideration of \$55,000.00. The County Commissioners placed this money to the credit of Madison County jail fund."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Can the Board of County Commissioners legally transfer a balance of \$21,475.00, the balance now being in the bank to the credit of Madison County jail fund, to the general funds of the county?

I am of the opinion that the law governing courts of county commissioners in this State makes no provision for a "jail fund," and the money received from the sale of the Madison County jail should have been credited to the general funds of the county.

The Court of County Commissioners had authority to sell the old jail under Section 209 of the Code of Alabama, 1923, and likewise to erect a new jail as provided for under Section 210 of the Code of Alabama, 1923.

The amount received from the sale of the old jail should be placed to the credit of the general funds of the county, and the amount required to purchase property and build a new jail should be paid for out of the general funds of the county. Therefore, the amount of \$21,475.00, now to the credit of the Madison County jail funds, can be placed to the general funds.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 6, 1929.

Hon. Henry S. Long, Chairman,
State Tax Commission,
CAPITOL.

1. Shares of capital stock in foreign corporation are securities within meaning of the word "securities" as used in Section 44 of Revenue Act, 1927 (Acts 1927, p. 174).

2. When shares of capital stock in foreign corporation are recorded and all fees and charges paid as provided by Sections 44 to 52, both inclusive, of Revenue Act, 1927, the ad valorem tax assessed on such shares of capital stock for the preceding year are thereby remitted and should not be collected by the tax collector.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of December 3rd is acknowledged. You ask my opinion upon the following:

A taxpayer listed his property for assessment with the Tax Assessor of Montgomery County as of October 1, 1928, which property so listed was duly assessed and the assessment turned over to the Tax Collector of Montgomery County for collection. The tax so assessed became due and payable on October 1st, 1929.

In the list of property, so assessed, were shares of capital stock in a foreign corporation owning and operating a cotton mill in a State of the United States, other than the State of Alabama. These shares of capital stock were, during the month of October, 1929, duly recorded in the office of the State Tax Commission and all charges and fees paid as provided by Sections 44 to 52, both inclusive, of the Revenue Act, 1927 (Acts 1927, page 174, et seq.).

You request my opinion:

Does such recording and payment of charges and fees have the effect of remitting the taxes so assessed upon such capital stock and thereby making such taxes uncollectable?

In reply will say that, in my opinion, the said shares of capital stock fall within the class designated in said Act as "securities", which are by said Act allowed to be recorded and secure the privileges provided by said Act. Said Act has been held by the Supreme Court of Alabama to be constitutional and otherwise valid. Section 51 of said Act reads as follows:

"Section 51. (a) No list of securities shall be received for record by the State Tax Commission unless and until the following privilege or license tax shall have been paid to the State Tax Commission upon such list of securities, before the same shall be offered for record, to wit: Upon all such securities listed with the State Tax Commission, the par value

or principal amount of which does not exceed One Hundred Dollars (\$100.00), the sum of twenty-five cents (25c) and upon all such securities the par value or principal sum of which is more than One Hundred Dollars (\$100.00) the sum of twenty-five cents (25c) for each One Hundred Dollars (\$100.00) of value or fraction thereof as shown in said list. For the purpose of this Act, shares of stock having no nominal or par value, included in any such list of securities, shall be taken in the determination of said tax as equal to One Hundred Dollars (\$100.00) par value per share, unless the actual value thereof be otherwise shown affirmatively on the list thereof to the satisfaction of the State Tax Commission, in which event the sum to be paid shall be twenty-five cents for each One Hundred Dollars (\$100.00) of the value thereof so shown.

(b) Upon the filing for record in the office of the State Tax Commission of any such list of securities, the owner of the securities listed therein or his agent, shall present said list to the State Tax Commission and pay to the State Tax Commission the amount of tax required under this section to be paid on account thereof, and upon such payment the State Tax Commission, or any member thereof or any of its assistants, shall certify on said list of securities the fact that the tax has been paid.

(c) The tax collected by the State Tax Commission under this Act, shall be paid by the State Tax Commission to the State Treasurer.

(d) There shall be no ad valorem tax assessed or collected upon any security included in any list on account of which the tax prescribed by this act shall have been paid, either State, county or municipal, either for the year in which listed, or for any preceding year, and such listing and payment shall on and after the date thereof be a bar to any legal proceedings by or on behalf of the State or any county or municipality of the State for the enforcement or collection of any escape taxes on account of the security included in any such list."

Said taxpayer having fully complied with all the provisions of said Act, it is my opinion that subdivision (d) of said Section 51 has the effect of remitting the tax assessed against said shares of capital stock as heretofore stated. As stated in said subdivision (d):

"There shall be no ad valorem tax assessed or collected upon any security included in any list on account of which the tax prescribed by this Act shall have been paid, either State, County, or municipal either for the year in which listed, or for any preceding year," etc.

By the very letter of the preceding, no ad valorem tax can be collected for last year or this year on the said shares of stock so listed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Superintendent of Insurance,
Montgomery, Alabama.

December 6, 1929.

Insurance Policy—The payment Protection Certificate submitted is not an insurance policy.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of September 18, 1929, in which you submit a specimen contract of insurance between the Maryland Casualty Company and the Segrest-Gentry Motor Company. Also a copy of a payment protection certificate issued by Segrest-Gentry Motor Company to its customers who purchase automobiles on the deferred payment plan. This certificate is issued in accordance with the contract of insurance between Maryland Casualty Company and Segrest-Gentry Motor Company. You also state in your letter that the Maryland Casualty Company is duly authorized to transact business in Alabama as a miscellaneous casualty company and operate through duly licensed resident agents. You further state that the Segrest-Gentry Motor Company of Montgomery, Alabama, is not an insurance company licensed to do business and none of its agents or representatives are licensed as insurance agents for the Maryland Casualty Company.

Upon this statement of facts you request the opinion of the Attorney General upon the following question of law:

Is the **payment protection certificate** issued by the Segrest-Gentry Motor Company to its customers in accordance with its contract of insurance with the Maryland Casualty Company such a policy of insurance as would require it to be countersigned and recorded only through a duly licensed resident agent, as required by Section 289 of the insurance laws of Alabama?

I have carefully examined the copy of the contract of insurance between the Maryland Casualty Company and the Segrest-Gentry Motor Company and the payment protection certificate issued by the Segrest-Gentry Motor Company to its customers who purchase automobiles from said company on the deferred payment plan, and am of the opinion that the payment protection certificate is not a policy of insurance, but when issued in accordance with the contract of insurance between the Maryland Casualty Company and the Segrest-Gentry Motor Company, it then becomes a part of that contract of insurance. The policy of insurance issued by the Maryland Casualty Company is issued to the dealer and paid for by the dealer, and payments under said policy are made to the dealer for their protection.

Therefore, the **Payment Protection Certificate** not being a policy of insurance, said Segrest-Gentry Motor Company is under no duty to comply with Section 289 of the insurance laws of Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 7, 1929.

The Alabama Real Estate Commission,
CAPITOL.

Real Estate Salesmen—Not required to devote entire time to real estate business.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of August 30, 1929. You state that a broker employed a real estate salesman, and that such salesman was granted a salesman's license by the Commission, but that he devoted a part of his time to selling automobiles and a part to selling real estate. You also state that the Commission is of the opinion that a broker or salesman must devote all his time to the real estate business.

You request my opinion:

Must a real estate broker or a real estate salesman devote all of his time to the real estate business?

In my opinion, your question must be answered in the negative.

I have made a very careful examination of the Act approved August 27, 1927 (General Acts 1927, p. 335), the Act creating the Alabama Real Estate Commission, and defining its duties. Said Act does not contain any provision which requires brokers and salesmen to devote their entire time to the real estate business.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 7, 1929.

Hon. Bibb Graves,
Governor of Alabama,
CAPITOL.

Workmen's Compensation—The State is not an employer within the terms of the Act.

Opinion by Assistant Attorney General Smith.

Dear Sir:

This is to acknowledge receipt of your letter of September 16, 1929, in which you enclose a letter addressed to you from General Wm. L. Sibert, Chairman and Chief Engineer, Alabama State Docks Commission. General Sibert submits the following statement of facts:

"The State Docks Commission, in the operation of its Terminal Railway and various other dock facilities at Mobile, will have many

injuries occurring to its employees and other persons with whom it does business, and has had numerous accidents in the past.

"Under the State Law Workmen's Compensation Insurance is required to be carried and under the Federal law certain other compensation insurance is required to be carried.

"Under the State Act creating the State Docks Commission, the question arises as to the authority of the State Docks Commission to pay the premiums on such insurance required by both Federal and State law. These expenses are usually incurred by all railroads and other industrial companies, persons and corporations, and it is reasonable to suppose that in writing the Act creating the State Docks Commission, it was intended that the Commission should have authority to protect its employees by such insurance and by the payment of such premiums."

"A few accidents have already occurred to persons not in the employ of the State Docks Commission, but occurring as a result of the operation of its facilities by the Commission. There is a form of insurance protecting the Commission in damage suits or claims arising from such accidents."

Upon the statement of facts submitted by General Sibert, you request the opinion of the Attorney General on the following question of law:

Whether or not the State Docks Commission has authority to take out and pay for Workmen's Compensation insurance under the State and Federal Compensation laws?

I am of the opinion that there is no law which requires or permits the State, or the Alabama Docks Commission to take out Workmen's Liability insurance for the protection of its employees.

Aside from the doubtful validity of such a law, the Workmen's Compensation Act (Acts 1919, p. 206), indicates clearly that neither the State, nor any political subdivision thereof was intended to be included within the meaning of the term "employer" as used in this Act. Section 8 of this Act provides in part as follows:

"This act shall not be construed or held to apply to any common carrier (doing an interstate business) while engaged in interstate commerce, or to domestic servants, farm laborers, or to any county, city, town, village or school district."

Section 30 permits every employer who accepts the provisions of this Act to take out employer's liability insurance.

Section 36 (d) defines "employer."

"The term 'employer' as used herein shall mean every person not excluded by Section 8 who employs another person to perform a service for hire, and to whom the employer directly pays wages, and shall include any person or corporation, co-partnership or association or group thereof, etc."

It is clearly the purpose of this law to afford employees a simple and adequate remedy for the collection of compensation for injuries received by them while engaged in their work. As to the employer, it substitutes one liability for another. As the State cannot be sued without its consent, and as no liability has ever existed against the State on account of any injuries suffered by its employees, I am sure the State is not an employer within the meaning of the Act.

See Constitution, 1901, Section 14.

Comer v. Bankhead, 70 Ala. 492.

White v. Alabama Insane Hospital, 138 Ala. 470.

Attorney General's Report, 1920-22, p. 61.

Attorney General's Report, 1926-28, p. 641.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1929.

The Sheriff,
Scottsboro, Jackson County, Alabama.

Clerk of the Circuit Court—An executor or administrator for a clerk of the circuit court, deceased, must turn over all monies, books, papers, and property of the county to his successor in office.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 25, 1929, in which you state that you have been appointed the administrator for George C. Blackwell, Clerk of the Circuit Court, Jackson County, Alabama, deceased. You state that you have certain fees in your possession and desire to know what disposition should be made of same.

In my opinion all monies, books, papers and property of the county which you hold, as administrator for the Clerk of the Circuit Court, should be turned over to his successor in office.

Section 6731 of the Code of Alabama, 1923, provides as follows:

"Any clerk of the circuit court, having in his hands, at the expiration of his term of office, any money held by him, subject to the further order, decree, or judgment of any court, shall, on demand, pay the same to his successor in office; and upon such payment, he shall be discharged from further liability therefor."

Section 7246, Code of Alabama, 1923, provides as follows:

"All clerks of courts of record in this state upon the expiration of their several terms of office, shall pay over to their several successors in office, all witness fees in their hands and which have been collected

by them and which have not been paid into the county treasury under the two preceding sections, and shall furnish such successor a full and complete statement showing the names of all witnesses for whom said fees were collected, the date of the collection, the amount due each of the witnesses, the court, the style of the cause, and the date of the final termination of the same, in which such fees were collected. After such payment to their several successors in office, or to the county treasurer or custodian of the county funds, as the case may be, they shall be discharged from further liability in regard to all fees so paid over, either to their successors, or to the county treasurer, or custodian of the county funds."

In view of the above sections, I advise you, as administrator for the Clerk of the Circuit Court, deceased, make a statement of his account and turn same over to his successor in office, together with all monies, books, papers and property of the County, and secure a receipt for same.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1929.

The County Treasurer,
Mobile, Mobile County, Alabama.

Highways: Expenditures of funds for planting Bermuda Grass on the "berms" or edges of concrete highway is a part of the construction and may be paid for out of the funds obtained from bond issue for building highways.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 4th, 1929, in which you state as follows:

"I have before me a claim for \$221.56 for planting Bermuda grass on the 'berms' or edges of one of our new concrete bond issue highways."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Is this a part of the "construction" of the road, which is properly chargeable to the bond issue funds for road construction?

I am of the opinion that the planting of Bermuda grass on the "berms" or edge of a concrete highway is necessary to keep the shoulder's or edges of the road from washing and is considered a necessary part of the construction of the highway and expenditures of funds for this purpose is a legal charge against the funds from bond issues for highway purposes.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1929.

The Judge of Probate,
Centre, Cherokee County, Alabama.

Stockholder and director of a bank who is also a member of the court of county commissioners cannot sit with said court while passing on and accepting bids for the county depository if the bank of which he is a stockholder and director is bidding.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 18, 1929, in which you state that one of your county commissioners is a stockholder and director of a bank that is bidding to become the county depository.

You request my opinion:

Would the commissioner, referred to above, be eligible to participate in the selection of a depository for the county?

Basing my conclusion on the facts stated above, it is my opinion he would not. Section 5024, Code of Alabama, 1923, referring to contracts with the county, makes it a criminal offense for any county officer to be pecuniarily interested in any contract, either directly or indirectly, in which the county may be interested.

Certainly it could not be said that a member of the court of county commissioners, who is a stockholder and director in a bank that is bidding to become the county depository, is not pecuniarily interested from the bank's point of view.

Biennial Report of Attorney General 1926-1928, p. 39.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1929.

The Register,
Circuit Court of Wilcox County,
Camden, Wilcox County, Alabama.

Trial tax in cases where respondent files petition for remarry.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 16, 1929, in which you state that you had a case filed in your court for divorce. The divorce was granted without a provision in the decree giving the respondents the right to remarry. The com-

plainant paid the cost, a part of which was an item of \$3.00 trial tax. Later on the respondent filed petition seeking the right to remarry.

You request my opinion:

Would the petitioner (who was the respondent in the original case) be required to pay the \$3.00 trial tax when filing his petition seeking such relief?

It is my opinion he would be required to pay an additional \$3.00 trial tax. Section 4½, General Acts, 1919, page 284, reads as follows:

"That a trial tax of three dollars be, and the same hereby is, imposed in each case, civil, criminal and equity, which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court, into the general funds of the state treasury."

The petition filed by the original respondent in which he seeks to be permitted to remarry is a separate and distinct proceeding, seeking separate and distinct relief and in my opinion carries with it the trial tax referred to above.

Biennial Report of Attorney General, 1926-28, p. 169.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1929.

Hon. L. C. Hughey,
Justice of the Peace,
Hazelgreen, Alabama.

Preliminary hearing fees of justice of the peace.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of November 11, 1929, in which you request my opinion as follows:

What fees am I entitled to as justice of the peace where I try a defendant in a preliminary proceeding and bind him over to await the action of the grand jury, he being later indicted and convicted in the Circuit Court?

These fees are regulated by Section 3755, Code of Alabama, 1923, which is as follows:

"3755. Costs and fees in preliminary trials.—Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs

of the committing magistrate and constable on preliminary trial, both together, not to exceed **ten dollars**, and the **fees** of the **state's** witnesses before the committing magistrate not to exceed **ten dollars**, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the state; **but** the committing magistrate shall receive no pay **unless** he reduces to writing the evidence taken on the preliminary trial, as required by law."

You will note from the above that your fees and the fees of the constable, both together, cannot exceed ten dollars. You will note further that you are not entitled to these unless you comply with the last clause of this section which states: "but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

Report of the Attorney General 1918-20, p. 583.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 10, 1929.

Superintendent of Insurance,
CAPITOL.

Insurance—Members of fraternal benefit societies cannot, through their secretaries, place insurance with unauthorized companies unless done so in accordance with the provisions of Section 290 of the Insurance Laws of Alabama.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of October 19, 1929, in which you state the following facts:

The members of certain fraternal benefit societies of the State are placing their insurance through their secretaries with unauthorized Insurance Companies, said companies not being fraternal companies. These secretaries of the local lodges of said benefit societies act as an agent of said unauthorized companies in that they take the application of the members for insurance policies, collect and remit the premiums for said policies and receive and deliver the policies to the members.

You inquire whether or not the above mentioned secretaries are agents within the meaning of Section 443, Insurance Laws of Alabama, (Section 1, General Acts 1927, p. 34).

I am of the opinion that said secretaries are Insurance Agents within the meaning of Section 443, Insurance Laws of Alabama, (Section 1, General Acts 1927, p. 34). Said section clearly states who are Insurance Agents.

Said secretaries come within the purview of this Section in that they take applications for insurance policies, collect and remit the premiums for said policies and receive and deliver the policies to the assurer. They act as agents for the unauthorized companies and not as agents for the individual members of the fraternal order.

If the said secretaries of the said fraternal benefit societies wish to solicit insurance in the manner above described, they must qualify as insurance agents as provided for in Section 444, Insurance Laws of Alabama, (Section 2, General Acts 1927, p. 35). Otherwise they are liable for prosecution under Sections 450 and 458, Insurance Laws of Alabama.

Section 290, Insurance Laws of Alabama, provides how one may place his insurance with unauthorized companies. If the members of the above mentioned fraternal benefit societies desire to place their insurance, in the above described manner, with insurance companies unauthorized to do business in Alabama, they must do so in compliance with this Section.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 14, 1929.

The Chairman,
State Tax Commission,
CAPITOL.

Chauffeur's License:—Driver of school truck liable for license as chauffeur.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have the letter sent you on October 9, 1929, by B. S. Landrum, License Inspector, in which he writes:

"There are 77 school truck drivers in this county. I cited them all for chauffeur license and about one-third of them paid, and the rest refused to pay."

He states that they defend their refusal to pay upon the ground that such truck drivers are "an arm of the state" and he wishes my opinion thereon and as to whether any such driver is liable for chauffeur's license. He further asks what steps he should take in discharge of his duty as License Inspector.

On September 27, 1929, I rendered an opinion in which I stated that chauffeurs driving school busses are liable to the State for chauffeur's license. This opinion was rendered to the State Tax Commission.

Opinions of Attorney General, Book 14, p. 102, (office edition).

On June 21, 1929, I gave the opinion that a school truck driver, who

drives a truck owned by himself, is liable for chauffeur's license. This opinion was rendered to the Judge of Probate of Chambers County.

Opinions of Attorney General, Book 12, p. 147 (office edition).

A chauffeur is statutorily defined in Alabama as follows:

"Chauffeur. An operator who directly or indirectly receives compensation for operating a motor vehicle on the public highways. This definition shall not be deemed to include manufacturer's agents, proprietors of garages, and dealers, salesmen, mechanics or demonstrators of motor vehicles when driving vehicles in any such capacity."

Section 25, General Acts of Alabama, 1925, page 292, prescribes that license must be procured by operators of motor vehicles as chauffeur, etc. It is my opinion that such truck driver as you describe is a chauffeur and does not come under the exemptions set out.

By what authority do such persons contend that they are an "arm of the State"? "Arm of the State" is a term sometimes used meaning a public officer. I assume the persons referred to in this letter are attempting to avoid the license contending that they are, by virtue of the fact that their work is driving school buses, public officers of Alabama. The question, who is a public officer is then presented for solution.

Chief Justice Marshall gave us this language:

"An office is defined to be a public charge or employment. Although an office is an 'employment' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or to perform a service, without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by the government to perform who enters upon the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs such duties from an officer."

U. S. vs. Maurice 2nd Broch (U. S.) 96 followed in Shelby vs. Alcorn, 36 Miss. 273.

Judge Swayne of U. S. Supreme bench said:

"A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration, and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

U. S. vs. Hartwell, 6 Wall (U. S.) 385."

Of what could the above be more true than the driver of a school bus?

"An employment on behalf of the government in a station of public trust, not merely transient occasional, or incidental."

20 Johns 492,
46 N. Y. 375.

The following persons with public function have been held to be not public officers, (or "arms of the state"):

A licensed pilot,

66 Ga. 503,

A commissioner to superintend the erection of a building for the state.

45 Ill. 397,

A commissioner to superintend the erection of a building for the county.

81 Ky. 67,

A special deputy sheriff.

27 N. J. Eq. 141,

Firemen, in cities and villages, and their various grades of officials.

32 N. Y. 377,

A member of a board of commissioners to fund the floating debt of a city.

28 Cala. 603,

It is true that whether or not a public employee is required to take an oath, give a bond, and keep an office or place of business does not absolutely determine whether employment is as a public officer.

200 Ala. 480,

yet, it must certainly be more than a mere contractual relation having to do with a work carried on by the state.

"A public employment may be created by law or by contract, but a public office can never be created by contract."

Harrington vs. State, 200 Ala. 480.

It was even decided that a State Health Officer, while an officer of the board is not an officer of the State, county or municipality.

187 Ala. 79.

I hope this will put to rest any contention that a driver of a school bus is an "arm of the state."

As to his method of procedure, it is in nowise changed. I see no reason why he should not employ the same methods, as prescribed by law, that have ever been open to him for the enforcement of his duties as license inspector.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 16, 1929.

The Judge of Probate,
Camden, Wilcox County, Alabama.

Judge of Probate member of Court of County Commissioners.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 5, 1929, in which you state that you are Probate Judge of your county.

You request my opinion:

Being Judge of Probate of Wilcox County am I in law and in fact a member of the court of county commissioners, or am I just merely chairman of the board and ex officio member by reason of the fact that I am Judge of Probate?

You are in fact and in law a member of the court of county commissioners of your county. Section 6748, Code of Alabama, 1923, which establishes the court of county commissioners of the various counties is as follows:

"6748. How constituted; a court of record—There is in every county a court of record, styled the court of county commissioners, composed of the judge of probate, as principal judge, and four commissioners, who are elected at the time prescribed by law, and hold office for four years from the first Monday after the second Tuesday in January next succeeding their election, and until their successors are elected and qualified."

You will note from the above quoted section that it says, among other things, that you are not only a member of the court, but you are the principal judge of said court, and as such you are the keeper of the records of this court.

See Section 6763, Code of Alabama, 1923.
Crenshaw County v. Sikes, 133 Ala. 626.

As such a member you cast the deciding vote where there is a divided court.

See Section 6765, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 16, 1929.

Judge of Probate,
Cullman, Cullman County, Alabama.

Court Reporter: No provision of law for the payment of Court Reporter to take testimony in preliminary hearing in Probate Court.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 26, 1929, in which you request the opinion of the Attorney General on the following question of law:

Is there any provision of law to pay for the services of a stenographer to take testimony in a preliminary hearing in the Probate Court?

I am of the opinion that there is no provision of law whereby a Court Reporter can be paid for taking testimony in a preliminary hearing in the Probate Court.

The only law providing for the payment of a Court Reporter is contained in Section 6733-6742 of the Code of Alabama, 1923, and these Sections apply to official Court Reporters for the various Circuit Courts of the State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 16, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Agricultural and Experimental Stations—Use of appropriations under Section 6, Act Legislature 1927, pp. 473-477.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of September 30th, 1929, in which you request the opinion of the Attorney General on the following questions of law:

Whether or not any part of the "appropriation of \$12,500.00 for the annual maintenance and operation of each sub-Agricultural and Experimental Station" can be used for the purpose of clearing land or building houses and fences, etc., or in preparation of said station for "operation" as provided for in Section 6 of an Act of the Legislature of Alabama, approved September 10, 1927, pp. 473-477?

The first paragraph of Section 6 of said Act appropriates the sum of \$125,000.00; that \$25,000.00 shall be used for each of said Stations so established. The above appropriation is for the following purposes: **construction of necessary dwellings, barns, outhouses, fences, and for the further purpose**

of other physical equipment for said sub-Agricultural Experiment Stations. The last paragraph of Section 6 of the Act appropriates the sum of \$12,500.00 annually to each of said sub-Agricultural Experiment Stations for the purpose of **maintaining and operating** said Stations.

I am of the opinion that the appropriation of \$125,000.00 can be used only for construction of necessary dwellings, barns, outhouses, fences and for the purchase of physical equipment as is necessary to operate said sub-station.

The annual appropriation of \$12,500.00 to each station can only be expended for the purpose of **maintaining and operating** said Station.

The word "maintain" means "to keep up, repair, preserve, bear the cost of, keep unimpaired, keep in good order."

Words and Phrases Judicially defined.

"Maintain" "involves those things which have to do with carrying on the business for which this station is established."

People v. Atchison, 133 N. E. 250.

The word "operate" means "to put into or continue operation or activity * * * to conduct or carry on the work."

State v. Wooley, 86 Conn. 175.

I am of the opinion that the \$12,500.00 appropriation for said station can only be used for the purpose of **maintaining and operating** the stations in accordance with the above legal definition.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 16, 1929.

Hon. C. W. Wilson,
Assistant Examiner of Accounts,
Prattville, Alabama.

Justices of the Peace and Constables fees: Convict Department not to pay costs of Justices of the Peace and Constables to exceed \$5.00 for preliminary trials.

Opinion by Assitant Attorney General Smith.

Dear Sir:

I have your letter of December 3, 1929, in which you request the opinion of the Attorney General on the following question of law:

Should the Convict Department pay the sum of \$5.00 in cases where convicts are sentenced to the penitentiary, to Justices of the Peace and

Constables for fees in preliminary trials as provided for in Section 3667 of the Code of 1923, or should the amount of \$10.00 be paid as provided for in Section 3755 of the Code of 1923?

I am of the opinion that the Convict Department should not pay an amount to exceed \$5.00 as costs of committing magistrate and constables for preliminary trials.

The Convict Department is responsible only for the items and the rate set out in the Schedule provided by this Section.

Attorney General's Report, 1920-22, p. 348.

This opinion is not in any way in conflict with the opinion rendered by Assistant Attorney General Haynes to the Circuit Clerk of Autauga County, dated October 7, 1929. Mr. Haynes was not dealing with the question of the amount required to be paid by the **Convict Department** as provided by Section 3667.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 16, 1929.

Clerk of the Circuit Court,
Huntsville, Madison County, Alabama.

Solicitors' fees: Conviction under Act of Legislature, 1927, pp. 669-670, would carry a solicitor's fee of \$10.00 being a misdemeanor where no special solicitor's fee is provided for by law.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 22, 1929, in which you state as follows:

A man here is charged by affidavit and warrant with practicing law without first having been regularly licensed to do so and you refer to this prosecution as being brought under Act of the Legislature 1927, pp. 669-670.

Upon this statement of fact you request the opinion of the Attorney General on the following question of law:

In the event he is convicted of the offense above set out what would be the proper solicitor's fee? Should it be \$30.00 as provided for in Section 3738 of the Code of Alabama, 1923, or should it be \$10.00 under the clause of said Section "for each conviction of a misdemeanor not otherwise provided for"?

I am of the opinion that in the event a person is convicted under the provisions of an Act of the Legislature 1927, pp. 669-670, the conviction would be for a misdemeanor, and no special solicitor's fee being provided for, it would fall under the clause of Section 3738, which provides as follows:

"For each conviction of a misdemeanor not provided for, \$10.00."

The Act of the Legislature above referred to is not a revenue law, but a police regulation, to define and regulate the practice of law in Alabama and to punish a violation of same.

However, if the prosecution is for failure to take out a license as provided for in the Schedule of licenses contained in the Revenue Laws of Alabama, the Solicitor's fee would be \$30.00 as provided for in Section 3738 of the Code of Alabama.

Attorney General's Report, 1926-1928, p. 615.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 17, 1929.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Schools—Issuance of warrants by County Board of Education to obtain money for erection of school building in city.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of August 13, 1929. You enclose copy of resolution of March 12, 1928, of the County Board of Education of Randolph County, whereby the County Board authorized the issuance of warrants in the amount of \$35,000.00 against the county three mill tax. Said warrants were issued for the purpose of erecting a school building in the City of Roanoke.

You request my opinion:

Did the County Board of Education of Randolph County have authority to pledge the county three mill tax for the purpose of obtaining money with which to erect a school building in the City of Roanoke?

In my opinion the County Board of Education of Randolph County did not have authority to pledge the county three mill tax for the above purpose unless title to the property was vested in the County Board of Education.

According to my understanding the schools of Roanoke are under the control of a City Board of Education.

The County Board of Education of any county which has levied or is levying a special county tax for school purposes in order to erect, enlarge or equip school buildings may issue and sell school warrants bearing interest at a rate not to exceed six per centum. Likewise, the Board of Education

of any county or of any city having a city board of education may issue school warrants bearing interest at a rate not to exceed six per centum:

Section 281, School Code of 1927.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 17, 1929.

Clerk of the Circuit Court,
Tuscumbia, Colbert County, Alabama.

Witnesses before Grand Jury—Witnesses summoned to appear before a Grand Jury who attend but are not examined on account of the Grand Jury being quashed by the court have no way in which to prove their attendance.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of October 18, 1929, in which you state that at the October Term of the Circuit Court a Grand Jury was summoned and empaneled. A number of witnesses had been subpoenaed to appear before this Grand Jury in cases that had been bound over on preliminary investigation. Before these witnesses appeared before the Grand Jury the Grand Jury was quashed, and discharged by the judge of the court. A new Grand Jury was drawn and summoned to convene the week following the quashing of the old Grand Jury.

You request my opinion:

Can the witnesses who were summoned, as stated above, in cases that had been bound over by justice of the peace on preliminary hearing, go before the new Grand Jury and prove their attendance? If not how are certificates to be issued to them?

It is my opinion there is no way for the witnesses who attended before the Grand Jury that was declared illegal to prove their attendance. There is no one empowered to issue certificates to such witnesses. The foreman of the Grand Jury is the only one who could do so. He is required to keep the amount of the certificates and mileage turned in while witnesses are attending the Grand Jury. He must turn the same under certificate into court, and the foreman of the new Grand Jury would, in my opinion, be without power to make this certificate, and the foreman of the Grand Jury that was quashed by the court would not now do so as his power ceased from the moment the Grand Jury was by the court discharged.

See Section 8678, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 18, 1929.

Hon. P. M. Norwood,
Justice of the Peace,
Gainesville, Alabama.

Fines for default in road service go to the County Treasury.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 11, 1929, in which you state that some of the fines in your County for failing to work the public roads are being remitted by some of the justices of the peace to the Board of Revenue of your County, others remitted such fines to the County Treasury.

You request my opinion:

Where should such fines go?

They should be remitted to the County Treasury. See Section 4038, Code of Alabama, 1923, and Biennial Report of Attorney General, 1926-1928, p. 682.

The Court of County Commissioners and Board of Revenue have no control over the fines and forfeitures, or power to dispose of the fund, though placed in the custody of the county treasurer for convenient disbursement pursuant to law.

Brown & Street vs. Parris, 93 Ala. 314.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 18, 1929.

Dr. Stuart Graves,
Acting State Health Officer,
CAPITOL.

Health—The State Board of Health may proceed under Article 2 of the Health and Quarantine Laws by Section 1161-1179, Code of Alabama, 1923, to remedy a situation producing impure water supply existing in a municipality.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 7, 1929, in which you state the following facts:

"The Alabama Mills Corporation operates a cotton mill located north of Dadeville. The village is sewerred. A sewage pump is provided

to pump sewage from a sump into the city sewer system. The pump has on occasions failed to function and sewage enters a creek by overflow from the sump.

Approximately one half mile below the above point of entry of the mill sewage into this creek there is located the intake of the municipally owned water plant which furnishes water to the City of Dadeville and the mill. The dilution in the creek is relatively small. The distance of travel is not far. The water plant is not at present operated scientifically, but even so should not be expected to carry a raw sewage load.

The situation is one which the Engineering Bureau of the State Board of Health views with some alarm as endangering the lives of approximately 2,000 people. It has taken certain precautions, but feels that this sewage should be immediately excluded."

You request the opinion of the Attorney General as to what is the proper procedure for your department to take to remedy the above situation.

I am of the opinion that the proper course for your department to pursue, under the facts as above set out, is to proceed under Article 2 of the Health and Quarantine Laws. (Sections 1161-1179, Code of Alabama, 1923.)

Section 1169, Code of Alabama, 1923, provides as follows:

"1169. Order of board on finding water impure or unwholesome.— Upon completion of any investigation said board, if it shall determine as a fact that the water being supplied or to be supplied is such that under all circumstances and conditions, it is impure, unwholesome, or unpotable, or may constitute a menace or danger to the health or lives of human beings, or that under all circumstances and conditions the existing or proposed works, systems, plant or water supply or proposed modifications thereof are not suited to the production and delivery of healthful, pure, and wholesome water, shall order the owner or operator to make, within a time to be designated by said board, such changes as said board deems necessary to secure a continuous supply of pure, wholesome, potable and healthful water, or may prohibit the use of said water supply or any modification, construction, or operation of said works, system or plant. Thereafter it shall be unlawful to use said water supply or to modify, construct or operate said works, system or plant, till said prohibition is withdrawn."

Under this section you have the authority to condemn said water supply. After this is done the remedy of the situation is left in the hands of the local municipality. Said municipality may then proceed under Article 28-29 of the Municipal Corporation Laws (Section 2076-2181, Code of Alabama, 1923), in conjunction with Article 2 of the Health and Quarantine Laws, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 23, 1929.

The Highway Director,
State Highway Department,
CAPITOL.

Sentence: When a statute provides a maximum but no minimum fine or sentence, a nominal fine or sentence may be imposed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 9, 1929, in which you request the opinion of the Attorney General as to the construction of Section 51 of the Highway Code (General Acts 1927, p. 336) relative to minimum fine that may be imposed for violation of said section.

I am of the opinion that where only a maximum fine or sentence is set out in a statute for a criminal law violation and no minimum fine or sentence is provided for, a nominal fine or sentence may be imposed.

Section 51, Highway Code (General Acts 1927, p. 336) provides that a person violating this section shall be punished by a fine not to exceed one hundred dollars, etc. No minimum fine or sentence is provided for.

Section 5277, Code of Alabama, 1923, provides as follows:

"5277. Misdemeanor for which no special punishment has been provided.—Any person who commits a public offense, which is a misdemeanor at common law or by statute, and the punishment of which is not particularly specified in this Code, must, on conviction, be fined not more than five hundred dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county, for not more than six months."

Here also there is no minimum fine or sentence provided for. This gives the court or jury a discretionary power as to what the minimum fine or sentence should be in such instances, but limits the maximum penalty to be imposed. The same rule applies where a specific statute fixes the maximum fine or sentence to be imposed, but is silent as to the minimum.

I am sending a copy of this opinion to Mr. R. L. Avery, Clerk of Jefferson County Court of Felonies and Misdemeanors, Birmingham, Alabama, as you requested.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

December 27, 1929.

The Judge of Probate,
Hamilton, Marion County, Alabama.

Licenses—a merchant who sells tobacco, either used or capable of being used in cigarettes without change of form or condition, without cigarette papers, is liable for a license under Schedule 34, Section 334, Revenue Laws of Alabama, but not under Schedule 35, Section 334, Revenue Laws of Alabama.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 5, 1929, in which you request the opinion of the Attorney General as follows:

Is a merchant who sells Prince Albert tobacco without papers to go with it liable for a tax of any kind?

In my opinion, a merchant who sells tobacco either used or capable of being used in cigarettes without change of form or condition, would be liable for a license under Schedule 34 of Section 334, Revenue Laws of Alabama (Acts 1919, p. 282, Section 361, Schedule 25), but not under Schedule 35 of Section 334, Revenue Laws of Alabama, (Acts 1927, p. 139, Section 2 (j)). Schedule 34 reads as follows:

"SCHEDULE 34 (25) Acts 1919, p. 282, Sec. 361, Sch. 25). CIGARETTE DEALERS. Every dealer who may sell or give away cigarettes, cigarette paper or cigarette tobacco or who furnishes their customers with cigarettes, cigarette paper or cigarette tobacco, in connection with any other purchase or transaction, or who may keep in their place of business any of said articles, whether sold or given away in connection with other purchases, in any place outside of incorporated towns or villages, ten dollars; in incorporated towns and cities of five thousand or less inhabitants, fifteen dollars; in incorporated towns or cities of five thousand to ten thousand inhabitants, twenty dollars; in cities of more than ten thousand and not exceeding twenty thousand inhabitants, twenty-five dollars; in all cities having more than twenty thousand inhabitants, forty dollars. In construing this schedule, "cigarette tobacco" shall be held to mean and include all tobacco, either used or capable of being used in cigarettes without change of form or condition, whether or not it is termed cigarette tobacco by the manufacturer or dealer."

An opinion of the Attorney General found in Biennial Report 1914-1916, page 276, in discussing the cigarette tobacco tax, concludes as follows:

"* * * While it might be difficult to draw any line between cigarette tobacco and other smoking tobacco, the rule to govern the taxing authorities is that the tax should be imposed upon dealers in that kind of tobacco which, on account of its mild flavor, preparation, and fine cut or ground condition, may be used in the making of cigarettes."

The Act now under consideration designates cigarette tobacco as "tobacco either used or capable of being used in cigarettes without change of form or condition" whether or not it is termed "cigarette tobacco" by the manufacturer or dealer. The dealer who sells a certain brand or kind of tobacco that comes within this classification, whether with or without papers, is liable for a license under this schedule.

Schedule 35 in every instance reads, "cigars, cigarettes, cheroots or any substitute therefor." It says nothing about smoking or chewing tobacco. Surely if the legislature had intended to include smoking or chewing tobacco in this schedule they would have done so, as they did in part in Schedule 34, (supra). It seems that smoking and chewing tobacco were intentionally left out of this schedule as only "cigars, cigarettes, cheroots or any substitute therefor" were enumerated. Smoking or chewing tobacco by itself, whether capable of being used in cigarettes or not, cannot be considered "a substitute therefor"—the cigarette papers being an essential element.

Whether or not Prince Albert tobacco or any other brand or kind of tobacco is a tobacco "that is either used or capable of being used in cigarettes without change of form or condition," is a question of fact, which this office has no authority to decide.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Dec. 27, 1929.

Hon. Charles E. McCall,
Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Elections—Democratic primary—Fixing of political qualifications of voters and candidates for participation in—Legality of action of State Democratic Executive Committee.

Opinion by the Attorney General.

Dear Sir:

I have your letter of December 19, 1929, calling my attention to the recent action of the State Democratic Executive Committee of Alabama in fixing political qualifications of voters and candidates to participate in the Democratic primary election of August, 1930. You refer to Sections 612 and 672, Code of Alabama, 1923. You state that said Democratic Executive Committee, by its resolutions of recent date, sought to fix the political and other qualifications of voters different from the qualifications fixed by it for candidates at said forthcoming primary election, and referring to said resolution, you further state that it is fully evident said Committee did not intend to place any restrictions upon the individual voter on account of any vote he

may have cast in the last general election, and that there was no intention on the part of said Committee to debar from voting at the next Democratic primary election, any person who did not vote for or who even openly opposed the nominees of the Democratic party. You further state that you are a qualified elector and that your name is on the list of registered voters entitled to vote in Election Precinct Five, voting place One, Butler, Choctaw County, Alabama. Upon this statement of facts you request my official opinion:

1. Has the State Democratic Executive Committee any authority of law to particularly fix the "political or other qualifications" of persons to participate in a primary election of the Democratic party except as in fixing the qualifications of persons desiring to become candidates for nomination for office at said primary?

2. The State Democratic Executive Committee having fixed the qualifications of persons desiring to become candidates for nomination at the Democratic primary election, does not the action of the Committee, in so fixing such qualifications of the candidate, at the same time fix the qualifications of the elector?

3. If the State Democratic Executive Committee had the authority to fix as qualifications for persons desiring to become candidates for nomination for office at the August primary election in 1930, that such persons must not have voted against or openly opposed the Democratic ticket at the last general election, did not the action of said Committee, in so fixing such qualifications for the persons desiring to become candidates, so fix at the same time, the qualifications of those persons who have a right to participate as voters in such primary?

Your attention is invited to Article VIII, Constitution of Alabama, 1901, (Sections 177-196, inclusive), and particularly to that part of Section 190 of said Article, which reads as follows:

"* * * The legislature shall also make provision by law, not inconsistent with this Article, for the regulation of **primary** elections, * * * but shall not make primary elections compulsory * * *"

By the above quoted part of said Section 190 of the Constitution, the legislature was given the power, and there was imposed upon it the duty, to pass laws regulating primary elections, with the inhibition stated that the legislature could pass no act inconsistent with Article VIII, *supra*, and could pass no act compelling the holding of a primary election.

Section 183 of the Constitution, (appearing in Article VIII), **prohibits** certain persons from voting or participating in primary elections, party conventions, mass meetings, or other methods of party action of any political party or faction. The persons prohibited from voting or otherwise participating in such matters are those persons who:

"* * * shall not possess the qualifications prescribed in this Article (Article VIII) for an elector, or who shall be disqualified for voting under the provisions of this Article."

In pursuance of Section 190, of the Constitution, *supra*, the legislature has passed laws regulating primary elections.

Sections 601-684, inclusive, Code of Alabama, 1923.

A "primary election" denotes an election held by a political party for the purpose of selecting candidates for public office.

A political party is a voluntary association of electors organized for certain political purposes and is governed and acts, unless otherwise provided by statute, by their own established rules and usages.

Political parties existed, and the character of their organization was a matter of common knowledge for a long period of time prior to the enactment of laws relating to primary elections. In Alabama, as in most other states, laws relating to primary elections are based on a recognition of political parties as governing agencies, and are generally intended to maintain the existing organization and usage of the party.

Biennial Report of Attorney General, 1922-24, p. 292.

Section 672, Code of Alabama, 1923, reads in part as follows:

"Any executive committee of a party may fix the assessments or **other qualifications** as it may deem necessary for persons desiring to become **candidates** for nomination to office at a primary election; * * *"

Said Section 672, insofar as it allows the executive committee of a political party to fix the qualifications deemed necessary by it for those persons desiring to become candidates for nomination to office at a primary election of said party, is merely declaratory of an inherent power previously existing in a political party and not taken away from any political party by the organic law. By usage, not inconsistent with the law, and by statute, therefore, the executive committee of the Democratic party has the power to fix the political and other qualifications of persons who desire to become candidates for nomination in the party primary.

This, in my opinion, from a legal standpoint, should dispose of any doubt as to the legal right of the State Democratic Executive Committee of Alabama to fix the political qualifications of candidates for nomination in the forthcoming Democratic primary election of 1930.

The legislature went further. By Section 669, it provided that:

"The State Executive Committee shall prescribe such other additional rules governing contests and **other matters of party procedure** as it may deem necessary, **not in conflict with the provisions of this chapter.**"

The chapter referred to is Chapter 20, Code of Alabama, 1923, regulating primary elections.

It is true that the title at the beginning of said Section 669 reads: "rules of state executive committee governing contests—" but the Supreme Court of

Alabama has held that the title at the beginning of a section of the Code is not a part of the section. Therefore, it is immaterial that the title at the beginning of said Code Section refers only to rules governing contests and not to "other matters of party procedure."

Ex parte Byrd, 172 Ala. 179.

A rule prescribing political qualifications of electors participating in a party primary is a rule governing "party procedure," and so long as that rule is not in conflict with the provisions of said Chapter 20, Code of Alabama, 1923, it is a valid rule of the State Democratic Executive Committee when duly adopted by it.

Section 612, Code of Alabama, 1923, provides as follows:

"All persons who are qualified electors under the general election laws of this state shall have the right to participate in such primary elections, subject to such political or other qualifications as may be prescribed by the state executive committee or governing body of such political party for its candidates. The state executive committee may delegate to the several county executive committees the power to prescribe the qualifications of voters in any primary election for the nomination of candidates for offices to be filled by the vote of a single county."

This Section of the Code is a part of an Act of 1915, (Section 11, Act No. 78, General Acts 1915, p. 220), which was amended by an Act approved September 30, 1919 (General Acts 1919, p. 969). The first sentence of said Section 612, Code of Alabama, 1923, as it appeared in said Act of 1915, reads as follows:

"All persons who are qualified electors under the general election laws of the state, shall have the right to participate in such primary elections, subject to such political or other qualifications as may be prescribed by the state executive committee or governing body of such political party."

It will, therefore, be observed that the expression "for its candidates" was the only **amendment** to the first sentence of Section 11 of said Act of 1915 by the Act of 1919, and, the first sentence of Section 612 of the Code of Alabama, 1923, appears as amended.

In my opinion, reading Sections 612, 624, 669 and 672, Code of Alabama, 1923, together, and in the light of all of the constitutional and statutory provisions of law applicable to primary elections, which procedure is in accordance with the rules of statutory construction, the legislature did not intend, by the amendatory Act of 1919, in adding the words "for its candidates" to the first sentence of the Act of 1915, to take away from the governing body of any political party, the right to fix **more liberal** political qualifications for voters than is set forth in the Act as amended and as carried in the Code as Section 612 thereof.

Section 612 of the Code is not a grant of power to the executive committee or other governing body of any political party. The power of the governing body of a political party to prescribe political qualifications for electors who might participate in its primaries, was and is an inherent power, insofar as is not circumscribed by law. In my judgment, the purpose and intent of the first sentence of Section 612 of the Code is to prevent any governing body of a political party from prescribing greater political qualifications for the electors than it prescribes for the candidates for party nomination. The legislature did not say that the governing body of a political party could not make the political qualifications of the masses of electors desiring to participate in the party primary, lesser than those of the candidate. Of course, if the governing body of a political party fixes the political qualifications for its candidates, those qualifications would have to be met by the electors desiring to participate in the party primary, unless the governing body of the political party adopted a lesser political qualification for the elector. But, as I understand it, the State Democratic Executive Committee of Alabama, has adopted a more liberal political qualification for the elector than it has adopted for its candidates.

I think it would be folly to assert that by mere legislative fiat, the long established customs and usages and all the inherent powers of the governing bodies of political parties in Alabama are destroyed through the enactment of Chapter 20 of the Code of Alabama, 1923. For the same reason do I believe that it would be folly to assert that a political party, through its duly elected officers constituting its governing body, cannot invite recruits to its legitimate membership and cannot extend an invitation to former members, who, conscientiously, in the last general election, voted against or openly opposed the legal nominees of the Democratic party.

I am aware of the fact that some persons are attempting to construe the recent action of the State Democratic Executive Committee as actually barring electors who do not possess the same political qualifications prescribed for candidates. This position is taken by such persons supposedly because of a literal interpretation of Section 612 of the Code, standing alone—without reference to other provisions of the law, and ignoring the inherent powers of governing bodies of political parties. It was never the purpose and intent of the legislature to so frame the law as to prevent the governing body of a political party from attempting to promote harmony, nor was it the purpose of the legislature to say that a political party, through its governing body, could not be more liberal in consideration of the masses of the electors than it could as to those who sought to be the standard bearers in party affairs. Those who now seek to set at nullity the recent resolution of the State Democratic Executive Committee of Alabama, are, by their very act, arguing for the disfranchisement of those whom the Committee invited to return as electors. Granting for the sake of argument that if the action of the State Democratic Executive Committee is illegal in attempting to make more liberal qualifications for voters than for candidates, it is self-evident that only such part of the resolution as would transcend the law, would be illegal. Therefore, if the argument of those who contend against the legality

of the resolution would prevail, it is evident, that, inasmuch as both by law and by custom, the governing body of a political party may fix political qualifications for its candidates, then that part of the resolution so fixing those qualifications would stand, and the other fixing the qualifications of voters would fall. But, this is not so. As heretofore stated, the Democratic Executive Committee, in my opinion, acted clearly within its legal rights in passing the recent resolution. Whether it was expedient or not, is not for me to say officially. The Committee did it. Critics of the legality of its action have, in my judgment, failed to take into consideration the various other provisions of the Code and the inherent powers existing within the governing body, as set forth above.

For the reasons stated, your questions are answered as follows:

To your first question—No.

To your second question—Not necessarily, and not in this case.

To your third question—No, because legally it had a right by law and by custom to liberalize the qualifications of the elector, and Section 612, Code of Alabama, 1923, was merely intended to prevent the Committee from placing a greater political qualification upon the voter than it placed upon the candidate.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 6, 1930.

The License Inspector,
Birmingham, Jefferson County, Alabama.

Licenses—radio dealers—Radio not musical instrument—No license collectible in this State against radio dealers. Radios are not musical instruments.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of December 18, 1929, which reads as follows:

“Please give me your opinion as to whether or not parties who sell radios are subject to a musical instrument license under the license law, under Schedule 139, Revenue Laws.”

You refer to that part of the Revenue Laws of Alabama, 1929, which part reads as follows:

“Schedule 139. Piano and organ dealers—For each person engaged in the business of selling, renting or delivering pianos, organs, talking machines, small musical instruments, or all of such articles in this State, either in person or by agent, consignee or broker, one hundred dollars as

a license to the State for each county in which he may do business, or in which he sells or attempts to sell such articles, and one-half of such amount as a license to each such county; but this license shall not apply to merchants or dealers having one or more permanent places of business in this State and keeping any of said articles as a part or all of their stock in trade such merchant or dealers keeping any such articles as a part or all of their stock in trade shall for the same pay to the State one annual license of one hundred dollars which may be paid in any one of the counties in which said permanent place or places of business is or are established, and the payment of such license in such county, as evidenced by the certificate of the judge of probate thereof, shall be sufficient for all other counties in which they may do business or sell or offer for sale such articles."

Schedule 139, p. 295, Revenue Laws of Alabama.

On December 29, 1927, I rendered an opinion to Hon. Pat M. Dannelly, Probate Judge of Wilcox County in which opinion I advised that Alabama requires no license of retail radio dealers.

Opinions of Attorney General, 1926-28, p. 403.

In your letter you suggest that radio dealers may be considered under the nomination of dealers in musical instruments. The schedule mentioned by you does include "small musical instruments". This would give rise to the question as to whether or not a radio is a "small musical instrument."

A musical instrument has been judicially defined as, "A contrivance by which musical sounds are produced."

32 C. J., p. 947.

3 Dom. L. R. 496.

14 Con. R. Cas. 175.

There could, in my opinion, be no serious contention that a radio is such a contrivance. A radio properly consists of at least two parts:

The sound wave producing part, called a sending set containing the microphone which accepts and transmits sounds, and a receiving set which receives and makes audible such sounds as the sending set with which it is in attune and within range may transmit to it. Such sounds may be conversation, information, music or otherwise. This receiving set is popularly called a radio. It is to this you undoubtedly refer in your request for an opinion.

This receiving set cannot be described as producing musical sounds. Indeed it has no relation to the production. The sound issues from a source so remote that it must pass through another agency, the sending set, before it is capable of being heard by aid of the receiving set, or radio. It is quite as likely to be any other sound as that of music.

It is my opinion that a radio is not a musical instrument and cannot come under the Schedule suggested in your inquiry.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 7, 1930.

The Judge of Probate,
Huntsville, Madison County, Alabama.

Domestic Corporations—Charter fees—basis of computation.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 4, 1929, in which you request the opinion of the Attorney General as to what amount of charter fee should be paid to you as Judge of Probate by Seidman Braid and Fabrics Corporation according to the affidavit submitted by the President of said company and enclosed in your letter.

I am of the opinion that such charter fees should be based on the proposed capital stock, but in no case less than five dollars.

Your attention is called to Section 6969, Code of Alabama, 1923, which reads as follows:

“Charter Fees, Amounts and How Paid.—At the time the certificate is filed in the office of the judge of probate, the incorporators shall pay to the probate judge for the use of the state, one dollar for every one thousand dollars of the **proposed capital stock**, but in no case less than five dollars.”

You will note particularly that portion of said section which I have underscored.

Attorney General's Report, 1926-1928, p. 650.

With reference to common stock of no par value, I call your attention to Section 7012 of the Code of Alabama, 1923, for estimating the amount so far as it applies to the non par value stock at \$100.00 per share, unless proof is made to you that it has a different value from \$100.00 per share.

In such a case it must be estimated upon its actual value as shown by the evidence before you.

Attorney General's Report 1926-1928, p. 148.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 10, 1930.

Clerk of the Circuit Court,
Fort Payne, DeKalb County, Alabama.

Clerk of the Circuit Court required to send transcripts in criminal cases to the Attorney General.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of recent date.

You request my opinion:

Is it necessary for the clerk of the Circuit Court to transmit to the Attorney General copies of transcripts in State cases which have been appealed?

In answer to your inquiry I am of the opinion that the clerks of the Circuit Courts are required to send copies of transcripts in State cases to the Attorney General when such cases are appealed to the Supreme Court or the Court of Appeals.

Code of Alabama, 1923, Section 6102.

The cited section of the Code directs the clerk, the register or judge of probate, as the case may be, to make out a transcript as required by law, and deliver the same to the appellant. It is also incumbent upon the clerk in making the transcript to make a copy thereof for the appellee, and deliver it to him or his attorney. It is a matter of common knowledge and of statutory requirement that the Attorney General represents the State in all criminal cases appealed to the Supreme Court or Court of Appeals, and it, therefore, follows that the clerks of the various Circuit Courts must file with the Attorney General a copy of such transcript.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 10, 1930.

Hon. J. L. Fulton,
Deputy License Inspector,
Bessemer, Alabama.

A State License to operate a business at one designated place in city, town or county does not authorize the same concern to do business at another place, city or town.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 12, 1929, in which you state that the

Evans Bonding Company procured a license for doing business at their office in the City of Birmingham. They also have an office in the City of Bessemer.

You request my opinion:

Can they operate both offices under the Birmingham license, Birmingham and Bessemer being in Jefferson County?

It is my opinion they cannot. As I understand it, this concern is licensed under Schedule 19 of an Act approved September 5, 1919, (General Acts 1919, p. 403), and the latter clause of this schedule states: "The payment of the license required by this schedule shall authorize the doing of business only in the town, city or county where paid." Again under Section 363 of Act, supra, in dealing with all business for which licenses are required, we have the following provision: " * * * nor shall it entitle the holder thereof to carry on any business or do any other act than that named therein, nor at any other location than that therein specified."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 10, 1930.

Hon. Posey Smith,
Member, Board of Registrars,
Rockford, Coosa County, Alabama.

Absentee voters—Right of persons residing out of county to vote in county.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of December 18, 1929. You state that you have on your county voting list more than two hundred voters who have removed from the county and whose names still appear as regular voters.

You request my opinion:

As to when they should be stricken from the list?

In an opinion rendered by the Attorney General on January 18, 1929, he stated:

"When a person moves from one county to another or when he moves from the state to another state to take up his residence at the place to which he moves, he automatically loses his citizenship."

Opinions Attorney General (office edition) p. 82.

One does not lose his citizenship or his residence by temporary absence, (Section 366, Code of Alabama, 1923), but is a matter of intent which intent

must be determined by the behavior of the voter. To constitute residence, but two things are necessary, the act and the intention.

Book 10, Opinions Attorney General (office edition) p. 59.

The residing of a person at a particular place accompanied by positive or presumptive proof of an intention to remain there for an unlimited time makes him a resident of that place.

Mitchell v. United States, 21 Wall. (88 U. S.) 350, 22 L. Ed. 584.

It denotes the actual or constructive presence of a person in a given place coupled with the intent to remain there.

104 N. Y. Sup. 122, 124.

When a voter becomes an actual resident of another county or state and his behavior is such that his intent is obviously to remain there for an indefinite period, or to remain away from any county for an indefinite period he immediately ceases to be entitled to vote in the county from which he has departed and his name should be stricken from the list as soon as it is learned that he has so removed himself.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1930.

The Tax Collector,
Mobile, Mobile County, Alabama.

Act No. 73, approved Feb. 18, 1927, (Acts 1927, pp. 55, 56 and 57) applies to all manufacturing plants falling within the terms and conditions therein stated for remission of taxes.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of October 28, 1929, was duly received. You wish my opinion upon the following:

A foreign corporation qualified to do business in Alabama on the 17th day of August, 1928. On the 20th day of August, 1928, it filed its application with the Board of Revenue and Road Commissioners of Mobile County for a remission of the taxes on its factory, lands, etc., assessed for county purposes for a period of five years from the date of completion of its factory as provided by Act No. 73, approved Feb. 18, 1927, (Acts 1927, p. 55 et seq.). This corporation manufactures in said factory, located in Mobile County "all kinds of wire and cable, together with all machinery and equipment for such purpose," as shown by application for exemp-

tion, which you sent with your letter. The factory was completed May 31, 1929.

The application for remission was duly granted, remitting county taxes on:

"All the real and personal property, plants, franchises, manufacturing establishments, factories and capital stock of said General Cable Corporation now or hereafter located in said County,"

for a period of five years from the date of completion of the plant or factory on the land described in the application.

You state that you have refused to accept anything but full payment, basing your contention on my ruling in the Saenger Theatre case, whereby, you say I advised you that nothing but wood pulp and cotton fabrics were exempted, and that the Board of Revenue did not have authority to grant exemption otherwise.

I presume you refer to the opinion of date November 22, 1927, written by A. A. Evans, Assistant Attorney General, to you in response to your letter of November 19, 1927. This opinion is found on pages 372 and 373, Biennial Report of Attorney General, 1926-1928. If you will read that opinion carefully, you will see that no such advice was given. You failed to read carefully and did not understand the opinion. There was no question of a factory involved in that opinion.

In that case it was said:

"It is perfectly evident that this Act applies to shipbuilding plants and to manufacturing plants only. Exemptions are strictly construed. Even if this were not the rule of law, by no stretch of the imagination could a show house or a theatre be classified as a ship building plant or a manufacturing plant."

In that case the question considered was whether or not the Act in question covered houses for exhibiting shows, or to a theatre. It was correctly held that the remission of county taxes provided by said Act did not extend to such a building.

Answering your present question, will say that, in my opinion, the Act does cover a manufacturing plant or factory for the manufacture of "all kinds of wire and cable, together with all machinery and equipment for such purpose." But, county taxes, as used in the Act, does not cover the three mill county school tax nor the district three mill school tax. To hold that it does, would make the Act unconstitutional and void.

Biennial Report of Attorney General, 1926-1928, pp. 56, 74, 101 and 507.

As to time when collection of county taxes is held up in the case under consideration, will say that the Act contemplates that the county taxes shall be assessed, but not collected. The property is not exempted from assess-

ment, but collection is remitted and the collector's report of county taxes should show this as reason for not collecting during the five year period remitted for. Hence, if the taxes are remitted before payment is due, the collection should not be made for such year.

If the factory was completed on May 31, 1929, the first taxes to which such remission applied was the county taxes, other than the three mill county school tax and the three mill district school tax, due October 1, 1929.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 14, 1930.

The Judge of Probate,
Brewton, Escambia County, Alabama.

Poll tax—As to persons in U. S. military service since November 11, 1918.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of December 27, 1929.

You request my opinion:

Whether one who enlisted and served in the United States military service in October, 1923, and was discharged in 1926, is, for the time spent in service, exempt from the payment of poll tax in this State.

The Constitution of Alabama prescribes that each male inhabitant of the State (the word "male" was automatically stricken by the 19th Amendment to the United States Constitution) between the ages of twenty-one years and forty-five years of age, not otherwise exempt, shall pay one dollar and fifty cents per year as poll tax.

Section 194, Constitution of Alabama, 1901.

On December 28, 1928, I wrote an opinion to the Tax Collector of Bibb County, Alabama, in which I construed amendment to Section 194½ of the Constitution of Alabama, and subsequent legislative enactment and amendment thereto.

In that opinion I stated that under the amendment, persons who honorably served in the military or naval service of the United States between January 1, 1917, and November 11, 1918, are exempt from the payment of poll tax, all that have or may hereafter accrue.

Book 8, Opinions Attorney General (office edition) p. 277.

The Act known as the Military and Naval Code of 1927, provides for the exemption of all officers and enlisted men from the payment of poll tax

during their active membership in the service of the National Guard of Alabama.

Acts of 1927, p. 597, Section 1600 (45).

I find no other legal exemption because of military or naval service.

Therefore, it is my opinion that one who enlisted and served in the United States military service at any time since November 11, 1918, if domiciled in Alabama, is not by reason of his military service, exempt from the payment of poll tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 15, 1930.

The Tax Collector,
Greenville, Butler County, Alabama.

Residents of Alabama, over twenty-one years of age and under forty-five years of age, are due poll tax, unless exempted by law therefrom. Being an unnaturalized foreigner does not exempt.

Poll tax is due from all persons, each year, on October 1st, who are residents of the State, twenty-one years of age and under forty-five years of age, not exempt by law.

Payment of poll tax is due to be paid in county of *bona fide* residence on October 1st.

Payment of all poll tax due is condition precedent to right to vote under the laws of the State of Alabama.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of November 25, 1929, to Hon. Chas. E. McCall, Chief Examiner of Accounts, has been referred by him to me for reply. You make the following statement of facts:

There is an Italian, by birth, living in Butler County. He is thirty-six years of age; has lived in this State several years; but has just been naturalized.

You desire my opinion as to what poll tax he is due and where it should be paid in order that he may qualify to vote at any general election held in this State.

In reply will say that a poll tax is due by each inhabitant of this State over the age of twenty-one years and under the age of forty-five, not exempt by law.

Section 194, Constitution, 1901.
Section 3029, Code of Alabama, 1923.

The fact of being a foreigner, not naturalized, and, therefore, not qualified to vote, does not exempt from payment of poll tax. Being due a poll tax is dependent upon age and residence and the further fact that one is not exempt from payment of poll tax. The fact that one is an unnaturalized foreigner does not constitute an exemption from payment of poll tax.

Poll tax is due October 1st of each year.

Shepherd v. Sartain, 185 Ala. 439.

It is due to be paid in the County in which such person legally resides at the time it is due.

Frost v. State, 153 Ala. 654.

The payment of all poll tax due is one of the conditions upon which a person is allowed to vote in Alabama.

Section 178, Constitution of Alabama.

It, therefore, follows that the person named by you, unless exempt for some other reason than as stated by you, must pay a poll tax for each year he has been a resident of the State of Alabama since he was twenty-one years of age. To determine this, he must count from the first day of October after becoming twenty-one years of age. If he became twenty-one years of age on the first day of October, his first poll tax became due that day. If he became twenty-one years old on October 2nd, his first poll tax became due October 1st of succeeding year.

Shepherd v. Sartain, 185 Ala. 439, 30th headnote.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 15, 1930.

The Tax Collector,
Geneva, Geneva County, Alabama.

Deposits by tax collector of State and County funds in a bank that is not designated a State and County Depository, is not a preferred claim.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 24, 1929, in which you state that on the 16th of November, 1929, you, as Tax Collector, deposited in the Farmers and Merchants Bank of Samson, Ala., to account of F. J. Ward, Tax Collector, \$468.44. The bank has since closed its doors, and is now in the hands of the State Banking Department.

You request my opinion:

Is a claim for this deposit by me as Tax Collector a preferred claim?

It is not. When you deposit money that belongs to the State or County in any bank that is not designated as a State and County Depository you do so at your peril, unless you follow the provisions of Section 3973, Code of Alabama, 1923, (which is set out further on in this opinion), and take from the bank in good faith at or before making the deposit an indemnity bond to secure the deposit, and even should you deposit money in a designated depository in order to be protected you must place it to your credit as tax collector. I refer you to Section 3973, Code of Alabama, 1923, which governs matters of this character, and is as follows:

"3973. Embezzlement by public officers.—Any probate judge, clerk of a court of record, register of the circuit court, sheriff, coroner, tax collector, county treasurer, trustee of public schools, notary public, justice of the peace, constable, or other public officer who knowingly converts to his own use, or permits another to use any of the revenue of the state, or of any county thereof, or any money paid into his office, or received by him in his official capacity, is liable to indictment, and, on conviction, must be punished as if he had stolen it; but none of the officers herein named shall be criminally liable under the provisions herein contained for depositing the revenue of the state or county, or any money paid into his office or received by him in his official capacity, in a bank if the officer making the deposit in good faith requires, and takes from the bank, at or before making the deposit, good and sufficient security to secure the payment of the funds deposited."

You will note in the above section the following paragraph:

" * * * who knowingly converts to his own use, or permits another to use any of the revenue of the state, or of any county thereof, or any money paid into his office, or received by him in his official capacity, is liable to indictment.

See also Mitchell v. Price, pro ami. 132 Ala. 120.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 15, 1930.

The Judge of Probate,
Mobile, Mobile County, Alabama.

After consolidation or merger of foreign corporations with a corporation organized under the laws of the State of Alabama—such merger or consolidation being made under the laws of Alabama—the corporation resulting from such consolidation or merger is a domestic corporation, subject, henceforth, to all the laws of Alabama applicable to domestic corporations with like powers and franchises, unless otherwise specifically provided.

When the capital stock of such corporation, so formed by merger or consolidation, is increased, it must be done in same manner as other domestic corporations, with like powers and franchise, are increased, and pay therefor the same fees except as otherwise specifically provided.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of December 27, 1929. You make the following statement of facts:

There were some time ago three corporations under the name, Gulf, Mobile and Northern Railroad. One was organized under the laws of Alabama, with a capital stock of two million dollars; one was organized under the laws of the State of Mississippi, with a capital stock of twenty-two million, five hundred thousand dollars; one was organized under the laws of the State of Tennessee, with a capital stock of five hundred thousand dollars.

On December 18, 1916, these three corporations were consolidated or merged under the laws of Alabama under the name of Gulf, Mobile and Northern Railroad. The corporation as thus formed under the laws of the State of Alabama, had a capital stock of twenty-five million dollars.

It is now proposed to increase the capital stock of said corporation from twenty-five million dollars to twenty-seven million dollars.

You wish my opinion, as to whether or not, under the facts stated, any fees should be paid to the judge of probate "before the report of the proceedings of the stockholders increasing the capital stock of the corporation shall be filed", as provided by Section 6972 of the Code, 1923, of Alabama.

In reply to your question will say that after the consolidation or merger of said corporations under the laws of the State of Alabama, such corporation resulting from the consolidation or merger, under the laws of Alabama, became a domestic corporation with a capital stock equal to the combined capital of the three merged or consolidated corporations. Henceforth, it was not different from any other domestic corporations so far as the fees required for increasing its capital stock. It is, in my opinion, governed in every re-

spect by the provisions of said Section 6972 and requires payment of a fee of an amount equal to one dollar for each one thousand dollars of the two million dollar increase—that is, a fee of two thousand dollars.

State vs. Atlantic Coast Line Railroad Co., 202 Ala. 558.

So far as Section 54½ of Act No. 163, approved July 22, 1927, is concerned (Acts 1927, page 176 et seq.) besides being of very doubtful validity, it does not purport to affect anything but the annual franchise tax.

Where the increase of capital stock takes place in the process of consolidation the fee is paid by virtue of Section 7039 of the Code. After the merger or consolidation has been perfected, the corporation formed by the merger or consolidation, becomes a domestic corporation and is treated as other domestic corporations except as otherwise provided by law. If such corporation then desires to increase its capital stock it proceeds in the same way, under the same provisions of law, and pays the same fees as do other domestic corporations.

That such is the case seems to me too plain for discussion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 16, 1930.

The Judge of Probate,
Moulton, Lawrence County, Ala.

License—One giving permanent waves is liable for a license, as a hair dresser, under Schedule 132 of Section 334 Revenue Laws of Alabama, 1929 (Acts 1919 p. 282 Section 361 Schedule 77).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 3, 1930, in which you request the opinion of the Attorney General as follows:

Is one, who is engaged in the profession of giving permanent waves, liable for a license, as a hair dresser, under Schedule 132 of Section 334 Revenue Laws of Alabama, 1929 (Acts 1919 p. 282 Section 361 Schedule 77); although such person is in a regular barber shop which pays a license under Schedule 17 Section 334 Revenue Laws of Ala. 1929 (Acts 1919 p. 282 Section 361, Schedule 14)?

I am of the opinion that one so engaged in giving permanent waves is liable for a license, as a hair dresser, under Schedule 132, Section 334 Revenue Laws of Alabama, 1929 (Acts 1919 p. 282 Section 361 Schedule 77).

Schedule 17, Section 334 Revenue Laws of Alabama 1929 (Acts 1919 p. 282 Section 361 Schedule 14) provides as follows:

"Barber Shops.—Each person engaged in the business of operating a barber shop shall pay a license fee of two and one half dollars for each chair."

Schedule 132, Section 334 Revenue Laws of Alabama 1929 (Acts 1919 p. 282 Section 361 Schedule 77) provides as follows:

"Osteopath, manicurist, chiropodist, hair dresser.—Each osteopath, manicurist chiropodist, or hair dresser practicing his profession shall pay an annual license of five dollars to the State, but no license shall be paid to the county. If such business is conducted as a firm, or corporation in which more than one person is engaged, each osteopath, manicurist, chiropodist, or hair dresser so engaged shall pay a license of five dollars; provided further, that no osteopath shall be required to pay a license until after he has practiced his profession for two years."

These two schedules are independent of each other, and anyone who comes within the provision of either or both is liable for a license under either or both schedules, as the case may be.

A hair dresser is defined as one who dresses or cuts hair; a barber.

Websters International Dictionary.

Surely one who is engaged in the profession of giving permanent waves comes within the above definition of a hair dresser. And such a person would be liable for a license under Schedule 132 Section 334 Revenue Laws of Alabama, 1929 (Acts 1919 p. 282 Section 361 Schedule 77).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 16, 1930.

The Judge of Probate,
Marion, Perry County, Alabama.

Court of County Commissioners—has no authority to allow anyone a fee for issuing road exemption certificate where money is paid in lieu of road work.

Judge of Probate—not allowed fee for issuing said road exemption certificate.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 7, 1930, in which you request the opinion of the Attorney General as follows:

Was the action of the Court of County Commissioners of Perry County legal, in that they passed a resolution giving the Judge of

Probate an allowance of twenty-five cents on each road exemption certificate issued, where money is paid in lieu of road work?

I am of the opinion that the said action of the Court of County Commissioners was illegal.

The Courts of County Commissioners of the various counties of the State are purely of statutory origin, and whatsoever powers they have are derived from the statutes. They have no inherent or constitutional powers.

Opinions of Attorney General Book 14, (office edition).

State v. Street, et. al. 23 So. 807, 117 Ala. 213.

Edwards v. Williamson, 70 Ala. 145.

The only statute relative to the payment of money in lieu of road work is Section 1363, Code of Alabama, 1923, which was amended by General Acts 1927 p. 395 (Section 172 of Act known as Highway Code), provides as follows:

"172. COMMUTATION BY PAYMENT OF MONEY. The courts of county commissioners, boards of revenue or courts of like jurisdiction may accept a money compensation to be fixed by them, not to exceed ten dollars per capita per annum from those liable for road duty in lieu of the labor required by law upon public roads, and provide for the time of payment of the same. Said money to go into the road fund of said county, and be appropriated exclusively for the maintenance and improvement of the public roads of such county as hereinafter provided by Section 175."

According to the above Section the Court of County Commissioners has the power to fix the amount of money to be paid in lieu of road work and the time limit for paying same, but **said money must go into the road fund of the county and be appropriated exclusively for the maintenance and improvement of the public roads of such county.** There is no provision allowing fees to anyone for collecting said money. Such is the duty of a Court of County Commissioners cum onere.

Those who accept public office which requires them to render services to the State, must take the office cum onere, and can receive only such salary as is authorized by statute.

Opinions Attorney General, Biennial Report of Attorney General 1926-28, p. 97.

I am unable to find any authority of law which allows the Judge of Probate a fee for issuing a road exemption certificate, where money is paid in lieu of road work.

Furthermore the Judge of Probate, Tax Collector, Tax Assessor, Sheriff, Clerk of the Court, Solicitor, County Treasurer, Members of the Court of County Commissioners, or Board of Revenue, or any state or county officer would be subject to criminal prosecution if he were to make such a contract with the county.

Code of Ala. 1923, Section 5024.

Opinions of Atty. Gen. Book 15, p. 45 (office edition).

Therefore, since the Court of County Commissioners has no authority to allow to anyone a fee for issuing road exemption certificate where money is paid in lieu of road work, and there is no law allowing the Judge of Probate a fee for rendering said service, the action of the Court of County Commissioners, in this instant, is illegal.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 16, 1930.

The Clerk of the Circuit Court,
Wetumpka, Elmore County, Alabama.

Only the sheriff or anyone clothed with the authority of the sheriff has the power to serve witness subpoenas in any court of record in Alabama.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 1, 1930, in which you request my opinion:

Who should serve witnesses for the State for the trial of a defendant for operating a motor vehicle upon the public highway without a license, the sheriff or license inspector?

The sheriff alone is the only person who can perform this service, except when the sheriff dies or is impeached, or becomes otherwise disqualified, then the coroner is invested with this power, under Section 161 of the Code of Alabama, 1923. Also any state law enforcement officer may perform this service who is also invested with all the powers of the sheriff by Section 926, Code of Alabama, 1923.

Section 10189, Code of Alabama, 1923 designates and fixes the duties of the sheriff and says among other things in subsection (1):

"(1) To execute and return the process and orders of the courts of record of this state, and of officers of competent authority, with due diligence, when derived to him for that purpose, according to law."

It is true the license inspector may make arrests for any violation of revenue laws of the State, but this authority is given him by specific statute. See Section 72 of an Act approved July 22, 1927, (General Acts 1927, p. 185) which reads in part as follows:

" * * * License inspectors shall have the same power to arrest persons violating the revenue laws of the State as is now vested in the

sheriffs of the State, and shall receive the same fees for such service."

Biennial Report of Attorney General, 1926-1928, p. 592.

Opinions of Attorney General rendered to License Inspector of Hale County, Feb. 8, 1929, (office edition) Vol. 9, p. 151.

But for the statute set out above the license inspector would be powerless even to making an arrest. This office has heretofore held that the power to arrest carries with it the power to accept approved bond.

Opinions of Attorney General, July 8, 1929, to State Tax Commission, (office edition) Vol. 13, p. 90.

When the license inspector makes an arrest and approves bond and turns the same into court here the power given him by Section 72, *supra*, ends, and all process growing out of the prosecution from this time on must be served by the sheriff.

This opinion takes the place of the opinion written to you on January 9, 1930. It only amplifies and enlarges on what was said in the original opinion referred to above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 25, 1930.

The Superintendent,
Bureau of Insurance,
CAPITOL.

Where books and papers of a mutual aid insurance company are inspected by an actuary designated by the Insurance Commissioner, compensation to such actuary for his services is governed by Section 8402 of Code of Alabama.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of October 26, 1929. You make the following statement of facts:

Several months ago your department, by virtue of authority vested in it by statute, had the books and papers of a mutual aid association, incorporated under the laws of the State of Alabama, examined by an actuary designated by you. The bill for the actuary's services amount to \$732.50.

You wish my opinion as to whether the payment for such services is governed by Section 8336, or by 8402 of the Code of Alabama, 1923.

In reply will say that it is my opinion that payment for the services, under the facts stated, is governed by said Section 8402. Said Section 8402 is special and specific, applying to mutual aid insurance companies only. This Section of the Code of 1923 is the same as Section 3570 of the Code of 1907. Section 8336 of the Code, 1923, is the codification of an Act of the Legislature passed and approved in 1915. There is a field for operation of each of said statutes; both are incorporated into the Code of 1923 as part thereof.

Where the older statute is special and the later one general, mere inconsistency in the provisions of the two is not enough to imply a repeal of the older special law. *State v. White*, 160 Ala. 168; *Mobile & Ohio R. Co. v. State*, 29 Ala. 573. If by any fair construction it is possible for each of two statutes to have some field of operation, both must stand, especially where the general words of the latter statute are the only evidence of legislative intent to repeal the particular provisions of the former act.

Iverson v. State, 52 Ala. 170.
Watson v. State, 4 Ala. App. 180.
Wyman v. Campbell, 6 Port. 219.
Kinney v. Mallory, 3 Ala. 626.
Smith v. Sneed, 5 Ala. 276.
Enloe v. Reike, 56 Ala. 500.
Parker v. Hubbard, 64 Ala. 303.
Rouse v. Jayne, 14 Ala. 727, 731.
Rawls v. Kennedy, 23 Ala. 240, 249.
Pearce v. Bank, 33 Ala. 693.
George v. Skeates, 19 Ala. 738.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

January 30, 1930.

The Chairman,
Board of Registrars,
Evergreen, Conecuh County, Alabama.

Registration—One must personally appear before a Board of Registrars in order to register.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 28, 1930, in which you request the opinion of the Attorney General as follows:

May one, who has all the qualifications of an elector, but who is temporarily absent from the County in which he resides at the time the books are opened for registration, legally register without appearing personally before the Board of Registrars?

I am of the opinion that in order for one to legally register, he or she must personally appear before the Board of Registrars at the specified time and place and be personally examined by said Board as to the necessary qualifications prerequisite to becoming a qualified voter.

Section 186 of the Constitution of Alabama 1901, provides that the Legislature shall provide by law for the registration after January 1, 1903, of all qualified voters, and that until the first day of January, 1903, all electors shall be registered under and in accordance with the requirements of this Section, etc. In accordance with this constitutional provision, the Legislature provided for the registration of voters in Article 3 of Chapter 19, Code of Alabama, 1923. Said section provides for the creation of the Board of Registrars, time and place of registration, who are qualified to register, etc. Section 377, Code of Alabama, 1923, provides as follows:

“Section 377. Places of registration.—No person shall be registered except at the court house or in the precinct or ward where he or she resides.”

Section 380, Code of Alabama, 1923, provides as follows:

“Section 380. Examination and oath of applicants to register.—The board of registrars shall have power to examine, under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. Each member of such board is authorized to administer the oath, to be taken by the applicant and witnesses, which shall be in the following form and subscribed by the person making it, and preserved by the board, namely: ‘I solemnly swear (or affirm) that in the matter of the application of for registration as elector, I will speak the truth, the whole truth and nothing but the truth, so help me God.’”

Reading these two sections together, it was, in my opinion, the legislative intent that in order for a person to legally register, he or she must personally appear before the Board of Registrars at the specified time and place and be personally examined as to his or her necessary qualifications to become a qualified voter. Such intention is further reiterated by Section 3913, Code of Alabama, which provides as follows:

“Section 3913. Unlawful registration.—Any person who registers for another, or who knowingly or wilfully registers or procures the registration of any person not possessing the qualifications of an elector, or who registers more than once, and any registrar who enters the name of any person on the list of registered voters without such person having made application in person under oath on a form provided for that purpose, or who knowingly registers any person more than once, or who knowingly enters a name upon the registration list as the name of a voter, without any one of that name applying to register, shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than five years.”

This last cited section specifically states "and any register who enters the name of any person on the list of the registered voters without such person having made application in person under oath on the form provided for that purpose," etc.

In addition, the Legislature provided for absentee voting in Article 4 of Chapter 19, Code of Alabama, 1923, but there is no provision for absentee registration. This, in my opinion, further shows that the Legislature never intended that one should be allowed to register other than in strict compliance with Article 3 of Chapter 19, Code of Alabama, 1923, *supra*. It made no provision for absentee registration and intended that there should be none.

In view of the above, I am of the opinion that for a person to legally register, he or she must personally appear before the Board of Registrars at the specified time and place and be personally examined under oath by said Board as to the necessary qualifications prerequisite to becoming a qualified voter.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 3, 1930.

The Superintendent of Education,
Evergreen, Conecuh County, Alabama.

Schools—Issuance of warrants to pay current expenses.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of December 4, 1929, in which you state that when an emergency appropriation was made for public schools in the spring of 1927 Conecuh County received from the first and second distribution of this fund \$9,974.97. You also state that at that time you were running your schools five months at a cost of about \$12,000.00 per month, and that from this appropriation you were required to extend your term two months. You further state that you had a deficit of approximately \$8,000.00 on salaries for that year. You further state that last year your appropriation was reduced 5½ per cent on the whole budget, and that this caused you another deficit of approximately \$7,000.00, and that the prospects are that you will not be able to have a seven months school this year without making another deficit. You also state that you could issue warrants to meet this deficit if authorized by law to do so.

You request my opinion:

Can the county board of education issue warrants to take care of the indebtedness referred to above?

In my opinion, if any of the above indebtedness existed on October 1, 1927, and is still unpaid you can issue warrants to pay same.

Section 130, School Code of 1927, provides that the County Board of Education shall have authority to borrow money on the credit of the school funds of the county to meet salaries of teachers and current expenses. When the current funds on hand are not sufficient to meet the same, to be secured by a pledge of the current revenues of the year. You will observe that this Section provides that such loans must be paid from current funds for the year unless they are based on county and district local tax proceeds. You will also observe that the amount so borrowed shall at no time exceed one-third of the sum paid out for current expenses during the preceding year. In my opinion, if your funds on hand are not sufficient to pay teachers' salaries and current expenses, you have authority under said Section 130 to borrow money and to pledge the local district tax proceeds for such purpose. However, in my opinion, said Section 130 does not authorize the issuance of warrants for the payment of past due indebtedness.

Section 136 of the School Code of 1927 provides that the County Board of Education may borrow money for the purpose of paying indebtedness incurred or created by such Boards, which are unpaid, and such as may be incurred or created to the first day of October, 1927, and may issue warrants therefor. You will also observe that at least one-fifteenth of such indebtedness must be retired annually. In my opinion the provisions of this Section authorize you to issue warrants for any indebtedness which existed on October 1, 1927, and which is still unpaid but does not authorize the issuance of warrants for any indebtedness created subsequent to October 1, 1927.

I have considered the opinions of the Supreme Court in the case of *Heustess v. Hearin*, 104 So. 273, and *State ex rel King v. County Board of Education of Russell County*, 108 So. 588. The opinion of the Court in the case of *King v. County Board of Education of Russell County* contains the following:

"County Boards of Education have very broad discretion in the administration and supervision of public schools and education interests of the county."

A County Board of Education in the administration and supervision of the schools in the County, as stated above, has broad authority, but of course, such authority is subject to the limitations provided by law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

Hon. C. L. Strange,
Maintenance Engineer, Mobile County,
Mobile, Alabama.

Board of Revenue—Board of Revenue of Mobile County has no authority to pay expenses of Maintenance Engineer of said County for attending Road Builders' Convention.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 18, 1929, in which you request the opinion of the Attorney General as follows:

Has the Board of Revenue of Mobile County, Alabama, authority to pay the expenses of the Maintenance Engineer of said County, whom said Board has authorized to attend the Convention of the American Road Builders Association to be held in Atlantic City, New Jersey, January 11th to 18th, 1930, for attending said Convention?

I am of the opinion that the Board of Revenue of Mobile County has no such authority. I am unable to find any statute or the construction of any statute that could give your Board of Revenue the authority to draw such a warrant or for same to be paid.

Weakley et al v. Henry, County Treas., 204 Ala. 463.

Opinions of Attorney General, Biennial Report, 1926-1928, pp. 496, 266.

Opinion of Attorney General, rendered Oct. 3, 1929, Book 15 (office edition).

Whatever power the Courts of. County Commissioners or Boards of Revenue have, is derived from the Legislature. They have no inherent or constitutional powers.

State v. Street et al, 23 Sou. 807.

Opinions of the Attorney General, Book 13, pp. 106, 133 (Office Edition).

Opinion of Attorney General rendered October 3, 1929, Book 15, (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

Judge of Probate,
Prattville, Autauga County, Alabama.

Cost of right of way of public road and damages incident thereto—
from what fund paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 21, 1929, in which you request my opinion as follows:

Is a claim for right of way and damages incident thereto paid from the road and bridge fund or from the general fund of the county?

It is my opinion that this would depend upon the tax levy of your county for roads and bridges. If the resolution levying your bridge and road fund provided among other things that this money should be used for building and maintaining roads and bridges of your county as well as for the payment of rights of way and damages incident thereto, then it is my opinion it should be paid from this fund. In reaching this conclusion I am presuming, of course, that your levy was in all respects regular.

See Section 1347, Code of Alabama, 1923.

Also see case of County of Montgomery v. City of Montgomery,
190 Ala. 388.

Biennial Report of Attorney General, 1920-22, p. 412.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

The Superintendent of Education,
Athens, Limestone County, Alabama.

Schools—tax collector has no right to collect a school tax that has been assessed by mistake.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 14, 1929, in which you state the following facts:

"On March 20th, 1920, your district voted to levy and collect a district three mill school tax to continue for a period of seven years from the 30th day of September next succeeding the holding of the election. The Commissioners Court assessed this tax after the election and before

the 30th day of September, 1920, and the tax collector collected the tax beginning October 1, 1920.

On March 6, 1925 another election was held in this district and a three mill school tax was voted for a period of two years from September 30, 1927. This additional tax was collected for the years beginning October 1, 1927 and 1928, and is assessed for the present tax year."

You request the opinion of the Attorney General as to whether or not the tax collector has the right to collect taxes for the year beginning October 1, 1929.

I am of the opinion that the tax collector has no right to collect the taxes this year under the circumstances as above set out. The tax so voted has been assessed and collected for the time specified. By what right could the tax collector collect a tax for this year when the law authorizing such tax is no longer in effect? The fact that same was assessed against the property is immaterial—there being no legal right to make such assessment. If such a tax was collected same would be an illegal collection.

School taxes, if collected illegally, may be recovered back under statute.

Wall-Hay-Wall Lbr. Co. v. Mathews, 100 So. 824.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

The Clerk of the Circuit Court,
Russellville, Franklin County, Alabama.

Clerks of the Circuit Court or other Courts of like jurisdiction cannot go bail for defendants.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 15, 1930, in which you state that you are Clerk of the Circuit Court and Ex-officio Clerk of the Law and Equity Court of Franklin County.

You request my opinion:

Can I individually go a bail for a defendant who is charged with a criminal offense?

You cannot. Section 3378, Code of Alabama 1923, forbids any officer clothed with judicial or ministerial duties to go bail for any person charged with a criminal offense. This Section reads as follows:

"Certain officers forbidden to become bail in certain cases.—It shall not be lawful for any judicial or ministerial officer of this state to go

bail for any prisoner or other person tried before him, or put in his charge under any criminal accusation, or to sign any bond or other obligation for the release or appearance of such person, either before himself or any other officer or officers."

Certainly you, as Clerk of the two Courts mentioned above, are a ministerial officer and as such you come clearly within the prohibition of the above quoted Section.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

The President,
State Board of Administration,
CAPITOL.

Service of summons or subpoena on convict confined in the penitentiary may be made by the President of the Board of Administration or by someone specially deputized by him to act in his stead and in his place in making such service.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 3, 1930, in which you request my opinion as follows:

When a suit is brought against any convict who is confined as a prisoner in the penitentiary, must the summons be served personally by me as the President of the Board or can I delegate this duty to someone else to serve such process for me and in my name and stead?

Section 3654, Code of Alabama, 1923, governs service of summons or subpoenas on persons confined in the penitentiary of the State and is as follows:

"Service of civil process on convict.—When any suit is brought against any convict who is imprisoned in the penitentiary, the summons or subpoena must be delivered to the president of the board, who must hand a copy to the convict and return the original by mail or by private conveyance to the proper court, indorsing on the envelope the title of the suit and the character of of the process, and any mesne process which it may be necessary to issue in the progress of any suit may be served in like manner; and if no appearance is entered for the convict, the court must require the plaintiff to prove his demand or cause of action."

While the above statute says the President must hand a copy of the summons or subpoena to the convict yet this is purely a ministerial duty. It

involves no judicial determination and any officer can deputize another to perform any duty of his office for him and in his stead which is purely ministerial.

Bouviers Law Dictionary, (Baldwin 1926, p. 295).

This duty here placed on the President of the Board, that is, the serving of summons or subpoenas, is ministerial in its nature, and, in my opinion, can be performed by an agent or deputy who is appointed and designated by the President of the Board to act for him and in his stead and when such deputy or agent is appointed to perform this duty it should be performed for and in the name of the President of the Board and return should be made in his name and not in the name of the deputy serving such process.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

Superintendent of Education,
Opelika, Lee County, Alabama.

City Board of Education—purchase of school equipment.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of December 9, 1929.

You request my opinion:

If a City Board of Education creates a debt by purchasing school equipment, is the city council or city commission responsible for the debt or is it an obligation for which the City Board of Education is responsible?

In my opinion the City Board of Education is responsible for the debt referred to above.

Section 201, School Code of 1927, provides that the City Board of Education shall have the full and exclusive rights within the revenue appropriated for such purposes, or accruing to the use of the public schools, to purchase real estate, furniture, appropriated libraries, fuels and supplies for the use of the schools.

You will observe from the above Section that the City Board of Education has full authority in the matter of purchasing school equipment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

Fireworks—License for selling.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of December 11, 1929, in which you request my opinion as follows:

1. Advise us if a license under Schedule 52, Section 361, Acts of 1919, should be taken out by a person selling fireworks in incorporated cities or towns, when such incorporated places of less than 5,000 are not within two miles of a larger city or town.
2. Also advise us if a person selling fireworks in unincorporated places not within two miles of any town of five or more thousand is required to pay this license.

Schedule 52, Section 361, General Acts, 1919, page 411, is as follows:

"Schedule 52. Fireworks.—Each dealer in fireworks such as roman candles, sky rockets, torpedoes, fire crackers, cannon crackers, cap guns, devil wheels and such other articles commonly known as fireworks, in cities, or within two miles of said cities, of twenty-five thousand population or more, fifty dollars; in cities or within two miles of said cities of ten thousand population and not more than twenty-five thousand, thirty dollars; in cities or within two miles of said cities of five to ten thousand population, twenty dollars; in all other places, ten dollars."

Answering your first inquiry will say that cities of less than five thousand population come under the last clause or paragraph of this Schedule which reads "all other places, ten dollars."

Answering your second inquiry will say all unincorporated places such as country stores, small towns and villages, also come under the last paragraph of this Schedule and are required to pay a license of ten dollars.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

The Judge of Probate and Ex-Officio Judge of the County Court,
Hamilton, Marion County, Alabama.

Retaxation of costs—court's power.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 14, 1929, in which you state that you have had filed as Judge of the County Court a motion to retax costs in a criminal case.

You request my opinion:

Am I authorized under the law to retax costs?

You may retax costs under the authority given by Article 3 on Retaxation of Costs. See Section 7247, Code of Alabama, 1923.

McCord v. Bridges, 207, Ala. 376.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 4, 1930.

The Superintendent of Education,
CAPITOL.

Schools—Custodian of school funds of city must make separate bond in addition to bond furnished as city treasurer.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 15, 1930, in which you refer to Sections 196 and 197 of the School Code of 1927, which sections relate to the bond of the city superintendent of schools and to the bond of the city treasurer. You state that it has been the practice to fix the amount of bond of a city superintendent at \$2,000.00, which is the amount prescribed by the State Board, and to approve the bond of the city treasurer in the amount fixed by the mayor and council, if it is found sufficient to protect the school funds.

You request my opinion:

Should a separate bond be required of the city treasurer and how should the amount of this bond be fixed?

In my opinion the city treasurer should be required to make a separate bond, and the amount fixed should be sufficient to insure his accounting and paying over to the proper authority of all monies coming into his hands.

Section 196, School Code of 1927, provides that the city treasurer shall be custodian of the school funds of the city.

Section 197, School Code of 1927, provides that before assuming any of the duties of the office the city treasurer must give bond in an amount to be fixed by the State Superintendent of Education in a reputable surety company authorized to do business in Alabama, conditioned upon the faithful performance of the duties of his office, and upon the accounting and paying over to the proper authority of all monies coming into his hands.

You will observe from the above Section 197 that the bond required should be for such an amount as will protect against loss of any money handled by the city treasurer of school funds. It necessarily follows that in fixing the amount of this bond the State Superintendent should ascertain what amount is necessary in order to protect against loss of any money which the city treasurer may have on hand at any time during the year.

It will be necessary to require a separate bond because there is no way of arriving at the amount of bond to be furnished if the city treasurer is allowed to make one bond covering his liability both as city treasurer and as custodian of the school funds of the city. You can readily see that this is advisable because in the event of a defalcation by the city treasurer and the custodian of school funds, considerable confusion would arise if separate bonds were not required.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1930.

The Clerk of the Circuit Court,
Ashland, Clay County, Alabama.

Solicitor's fee for driving car without tail light.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 19, 1929, in which you request my opinion as follows:

What would be the solicitor's fee on a conviction for operating a motor vehicle without a tail light?

I do not find that in the passage of this statute there was any provision made for solicitor's fees. Therefore, we are compelled to refer this to the general law covering solicitor's fees, which is Section 3738, Code of Alabama, 1923. This section provides among other things:

"* * * * For each conviction of a misdemeanor, not otherwise provided for . . . \$10.00 * * *"

Biennial Report of Attorney General, 1926-1928 p. 520.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1930.

Hon. Mack Durham,
Fort Payne, DeKalb County, Ala.

Justices of the Peace vacate office when they move from the beat or precinct where elected.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of December 23, 1929, in which you state that at the last general election you were elected justice of the peace of your precinct and that you have moved into another adjoining precinct in order to have better school advantages for your children. You have rented your former home for a year.

You request my opinion:

Would I by moving out of my precinct vacate my office in said precinct as justice of the peace?

It is my opinion that you would. Section 8707, Code of Alabama, 1923, I think, clearly settles this matter, and is as follows:

"8707. Removal from precinct vacates office.—Justices of the peace vacate their offices by removing from their election precincts, and are liable to a penalty of forty dollars for acting as justice after such removal, to be recovered before any justice of the county in which such justice resides, by any one suing for the same; one-half to the use of the person suing for the same, and the other half to the use of the county."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1930.

Hon. J. B. Pippin,
Justice of the Peace,
Sheffield, Alabama.

Party who receives and accepts claims or accounts for collection charging commissions on same who is not a licensed attorney is guilty of a misdemeanor under Section 6248, Code of Alabama, 1923, as amended by an Act approved September 7, 1927, (General Acts, 1927, p. 669).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 27, 1929, in which you state that you have a party charged in your Court for violation of Section 6248 Code of Alabama, 1923 as amended by the General Acts of 1927, page 669, and that the facts in connection with this case are as follows: This party is employed by the Alcorn Credit Company with a guaranteed salary of \$150.00 per month, but the salary must be made by charging delinquent debtors fees on defaulted accounts. The defendant accepts defaulted accounts from the Alcorn Credit Company in charging each delinquent debtor a fee in addition to the amount owed by the debtor.

You request my opinion:

Does such a person come under the provisions of the Act above referred to, which Act designates who are practicing attorneys?

It is my opinion he does and that he falls under subdivision (d) of said Act.

Taking the facts as you give them, in the first place the charging of commissions on accounts is illegal as there is no authority of law for such a fee on open accounts even though he was a legally licensed attorney he could not collect such a commission. It is only when a party signs a separate written instrument agreeing to pay such commissions in case the demand or note after maturity is placed in the hands of an attorney for collection can such charges be made. Subdivision (d), supra, is as follows:

"* * As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employe in the ordinary sense; is Practicing Law, * *"

Certainly if this party went out collecting or adjusting these accounts he would come under the provisions of this subdivision and would be subject to the penalties unless he was a legally licensed attorney.

Biennial Report of Attorney General, 1926-1928, p. 297.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 5, 1930.

The Circuit Solicitor,
Mobile, Mobile County, Alabama.

Bail—One may be accepted as surety on more than one bail bond at the same time, provided that no one bond exceeds valuation of his exempted property.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 24, 1930, in which you request the opinion of the Attorney General as follows:

May one who owns a certain amount of property, over and above his exemptions, and who is surety on a bail bond for that certain amount, be accepted as surety on other bail bonds at the same time?

I am of the opinion that one may be accepted as a surety on a number of bail bonds at the same time, provided that the amount of anyone of the undertakings does not exceed the value of the property he owns, over and above his exemptions.

Section 3376 Code of Alabama, 1923, provides as follows:

"3376. Qualifications of bail.—The qualifications of bail are, that each must be a resident of this state, and a householder and freeholder therein, and that each must be worth, exclusive of property exempt from execution, the amount expressed in the undertaking; but the court, magistrate, or officer, in taking bail, may allow more than two persons to justify severally as bail in amounts less than that expressed in the undertaking, provided the whole be equivalent to two sufficient bails."

According to this section the amount of the undertaking should not exceed the value of the property, not exempted. If this qualification, and the other qualifications enumerated above, are fulfilled, said party may be accepted as a surety. The fact that one may be a surety on other bonds is not an incumbrance on his property. The liability may never accrue. A forfeiture may never be taken. It is merely a contingent liability; the same as any other claim against a party that has not been reduced to judgment and properly recorded. It is not incumbent on the officers who accept one as surety on a bond to have the property, assessed by the prospective surety, examined for defects in title. One with property assessed at the high value may be a poorer risk than one who has only a small amount of property assessed in his name. The amount of property owned is not the controlling factor, but is only one of the necessary qualifications of bail.

Practically in all instances one is entitled to bail as a matter of right, but the approval of the bail bond is a discretionary duty imposed upon the proper officials, as the case may be. If, in the opinion of the said proper official, a bail would be insecure, he may refuse to give his approval. In this way the State is protected.

The duty imposed upon judicial or other officers, with respect to the approval of bonds, involves the determination of the sufficiency of the sureties and other matters of quasi judicial nature, requires the exercise of judicial judgment or discretion, and, ordinarily, will not be coerced by mandamus.

Ex parte Harris, 52 Ala. 87,

Payne v. Spraggins, et al. 207 Ala. 264.

As a general rule a writ of mandamus will not issue to review an exercise of judicial or quasi judicial discretion, and this rule applies to approval of official bonds.

Foshee v. State ex rel Messer, 210 Ala. 155.

When, however, the officer refuses to act on the bond tendered, or bases his refusal to accept it on a specified reason which is insufficient at law, mandamus will lie, not to compel his approval, but to require him to pass upon the sufficiency of same without regard to the supposed defect.

Mobile Mutual Insurance Co. v. Cleveland, 76 Ala. 321,

Payne v. Spraggins, et. al. 207 Ala. 264.

Yours truly,

CHARLIE C. McCALL,

Attorney General.

February 6, 1930.

Judge of Probate,

Heflin, Cleburne County, Alabama.

Commissioners Court: What constitutes quorum.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 15, 1930, in which you state that a certain claim which was presented to the Commissioners Court was passed on with you as Probate Judge and two Commissioners sitting.

You request my opinion:

Is this sufficient to authorize the issuance of a warrant?

It is my opinion that it is. Section 6751, Code of Alabama, 1923, states what constitutes a quorum of the Court and is as follows:

"6751. Quorum of Court.—The court may be held by the judge of probate and two commissioners, or with three commissioners without the judge of probate."

Therefore, if two of your Commissioners were present voting and you as Probate Judge was present presiding, it is sufficient to pass any claim before

the Court and would warrant you as Judge of Probate to draw warrant on the County Treasurer for its payment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 6, 1930.

Hon. J. R. Young,
Secretary, Jury Commission,
West Blocton, Bibb County, Alabama.

Jury Commissions—Their duties construed.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of January 4, 1930, in which you state that your Jury Commission differ as to the construction of the statutes which pertain to the duties of said Commission, that they are unable to understand the conflict in Sections 8601 and 8604, Code of Alabama, 1923.

You request my opinion:

1. Shall the Commission meet on the first Monday in October of each year and prepare a new roll and deposit it in the box?
2. Shall they refill the box at this time whether the box is exhausted or depleted?

I am unable to see how your Commission construes Sections 8601 and 8604 so as there would be a conflict. Section 8600, Code of Alabama, 1923, provides:

"That the Jury Commission shall meet in the courthouse at the county seat of the several counties on the first Monday in October, in each year, or as soon thereafter as practicable, and shall make in a well-bound book a roll of every male citizen living in the county, who possesses the qualifications herein prescribed, and who is not herein specifically exempted from serving on juries * * *."

This section just means exactly what it says, and that is that on the first Monday in October or as soon thereafter as practicable, the Jury Commission must meet and in a well-bound book place the names of all male citizens in the County who possess the qualifications as jurors.

Then Section 8601 provides further:

"Upon the completion of the roll, the commission shall cause to be prepared plain white cards, all of the same size and texture, and shall have written or printed on the cards, the name, occupation and place of residence, and place of business of the person, whose name has been placed on the jury roll;"

Section 8602, Code of Alabama, 1923, provides:

"These cards shall be placed in a substantial metal box, provided with a lock and two keys, etc."

Section 8603 designates who are qualified jurors whose names shall go on the jury roll and in the jury box.

Section 8604 is intended to take care of the juries of a county when the names placed therein have become exhausted or so depleted that they may probably be exhausted at the next drawing of jurors.

After the box has been filled as prescribed by Section 8601, supra, and the jurors have been drawn from this box for the juries of the ensuing term the box is exhausted or depleted, then it becomes the duty of the Jury Commission to refill the box, empty out the names that may be left in it, burn or destroy them, and refill the box from the jury list made on the first Monday in October preceding, and this can be done as often during the year as the box may become exhausted or depleted. There is no set time for the Commission to fill this box except the first filling which must be done upon the completion of the jury roll required to be made after the first Monday in October of each year. The case of *Steele v. State*, 20 So. p. 648, was not construing our present statute, i.e., 8604, supra, but was construing a similar statute, Section 7242, Code of Alabama, 1907. Section 7242, Code of Alabama, 1907, supra, provided that the names in the box must be exhausted before the box could be refilled while Section 8604, Code of Alabama, 1923, provides that the box may be refilled when it becomes "exhausted or so far depleted that they will probably be exhausted at the next drawing of jurors * * *." The same Section provides further on "the jury commission must meet whenever it is necessary and refill the jury box."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 6, 1930.

Hon. Hamp Draper,
Associate Member,
State Board of Administration,
CAPITOL.

Damages for injury to highway employe.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I am in receipt of your letter of January 28, 1930, in which you state that you had an employe of the Highway Department, Mr. Overton, who was injured while in the performance of his duties as such employe. You also

state that the expenses incurred on account of such accident including hospital and medical fees amounted to \$47.00.

You request my opinion:

Have I under the authority of Section 7, page 68, of an Act approved February 10, 1923, (General Acts, 1923) to pay said claim?

I am unable to find any law or statute that would give you the authority to settle this claim. I have examined the Section referred to by you, namely, Section 7 of an Act approved February 5, 1923, (General Acts, 1923) but I do not think this Section gives you the authority to settle such claims. Before you can pay any claim or pay out any money for any purpose you must be able to point to some direct law authorizing the payment and I am unable to find such authority.

Biennial Report of Attorney General, 1926-1928, p. 266.
117 Ala. 203.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 7, 1930.

The Judge of Probate,
Clanton, Chilton County, Alabama.

Elections—One is entitled to notice as provided for in Section 393, Code of Alabama, 1923, as amended by the Act of 1927, p. 276, before his or her name can be stricken from the list of qualified voters.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 29, 1930, in which you request the opinion of the Attorney General as follows:

1. What is the law relative to the right of the Board of Registrars to strike from the list of qualified voters those who have moved from the county?
2. What notice is required to be given to one, before his or her name can be stricken from said list?

In answer to your first inquiry wish to refer you to the opinion of the Attorney General rendered January 10, 1930, to Hon. Posey Smith, Member of the Board of Registrars of Coosa County, Ala., (Book 16, office edition) a copy of which is herewith enclosed.

In answer to your second question I am of the opinion that such notice must be served within at least five days before the second Monday in February, and also said notice be given in some newspaper in the county

by one insertion, in compliance with Section 393, Code of Alabama, 1923, as amended by an Act of 1927, p. 276. But in the event personal notice cannot be had, the newspaper notice will suffice.

Section 393, Code of Alabama, 1923, as amended by an Act of 1927, p. 276, provides as follows:

"Notice and hearing when names are to be stricken from list.—When the name of any elector is proposed to be stricken from the registration list, unless he or she is dead or is a non resident of the state, notice shall be issued to him or her by the board of registrars, citing him or her to appear before the board on the second Monday in February, following, and show cause why his or her name should not be stricken from the list. Said notice shall be served by the sheriff at least five days before the second Monday in February. The board of registrars shall in addition to the above notice give notice in some newspaper published in the county by one insertion."

In my opinion, the additional notice by publication, provided for in the above cited section, was intended by the Legislature to substitute for personal notice, in case same could not be obtained. For what other reason was said provision included therein? There is no other direct provision providing what shall be done in case personal notice cannot be obtained. It would be unreasonable to hold that before one's name could be stricken from the list of qualified voters that he or she be personally notified of such intention. A party may never be found; and in such event his or her name would have to remain on the list of qualified voters forever.

Suffrage is a privilege and not a right. Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on the grounds of general policy; the prevailing view being that it should be as general as possible consistent with the public safety.

Cooley's Con. Lim. (5th Ed.) 752, (599)
Washington v. State, 75 Ala. 582, 584.

Unless one fulfills certain requirements, he or she may be denied the right of voting. To hold that one is entitled to only the notice provided for above, does not violate any constitutional or inherent right—the same not being analogous to criminal or civil service.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 12, 1930.

Dr. C. A. Cary,
State Veterinarian,
Auburn, Lee County, Alabama.

Court of County Commissioners—Appropriations for the work of the suspension of any infectious or communicable disease of livestock.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 8, 1930, in which you request the opinion of the Attorney General as follows:

Can the County Board of Revenue appropriate money for the eradication of any infectious or contagious animal diseases to the County or State Board of Health, when the State Veterinarian in behalf of the State Board of Agriculture applies for money to eradicate and control the same disease?

I am of the opinion that your question should be answered in the negative. Said appropriations made by the Court of County Commissioners must be made to or through the authority of the State Board of Agriculture or the State Veterinarian.

Article 40, (Sections 563-592) Agricultural Code of 1927, is entitled "Livestock Sanitary Powers."

The authority of the Court of County Commissioners to make the appropriations referred to above, is found in Section 572 of the Agricultural Code of 1927. Said section provides as follows:

"The work of suppression or eradication of any infectious, contagious, or communicable disease of live stock shall be taken up under the provisions of this Article in any county or any part of a county or any part of the State of Alabama, when the State Board of Agriculture deems it best. The county commissioners of any county in which the State or Federal authorities takes up the work of the suppression of any infectious, contagious, or communicable disease of live stock, may appropriate for aiding in such work, such sums as the county commissioners or the State Veterinarian may deem adequate and necessary."

Section 563, Agricultural Code of 1927, provides in part as follows:

"Section 563. The State Board of Agriculture shall have full power to make or enact such rules and regulations as may be deemed necessary for governing the movement, transportation or disposition of livestock that may be quarantined as hereinafter provided on account of being affected with, or exposed to, a contagious or communicable disease, or on account of being infected, or infested, with the carrier or carriers of the cause of a contagious, infectious or communicable disease of livestock. * * *"

Section 565 of the Agricultural Code of 1927, provides as follows:

"Section 565. The Dean of Veterinary College of the Alabama Polytechnic Institute shall be the State Veterinarian of Alabama and shall receive such compensation and expenses as may be approved by the State Board of Agriculture in the execution of the provisions of this Article, and he shall exercise all the powers vested in the Commissioner of Agriculture and Industries in the enforcement of the provisions of this Article."

These sections, and other sections of Article 40 of the Agricultural Code of 1927, must be read together. From a thorough reading of the entire article it follows that this work is to be carried on exclusively under the supervision of the State Board of Agriculture, through the State Veterinarian. Any other mode of carrying on this work is without authority of law. The appropriations of the Court of County Commissioners for this work must be done in accordance with the provision of Section 572, to be read in connection with other sections of Article 40, *supra*. Therefore, same must be done through the authority of the State Board of Agriculture or its legally authorized agent, the State Veterinarian.

Whatever power courts of county commissioners or boards of revenue have is derived from the Legislature. They have no inherent or constitutional power.

State v. Street, et al 23 So. 807.

Opinion of Attorney General, Book 15, p. 5, (Office Edition).

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 12, 1930.

Clerk, Circuit Court,
Pell City, St. Clair County, Alabama.

Solicitor's fee—on appeal of a criminal case from the County Court to the Circuit Court the fee due the County Solicitor who prosecuted the case below shall be taxed on a conviction in the Circuit Court in addition to the Solicitor's fee in the Circuit Court and collected as other costs.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 8, 1930, in which you state that you have a case that has been appealed from the County Court of St. Clair County to the Circuit Court after conviction, and a conviction has been had in the Circuit Court for the same offense.

You request my opinion:

Do I as Clerk of the Circuit Court collect the Solicitor's fee which attached in the County Court together with the fee of the Solicitor for prosecuting in the Circuit Court?

You do. Under Section 3738, Code of Alabama, 1923, page 196, provision is made for the collection of this fee and reads as follows:

"For every conviction of a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury, the same solicitor's fees provided for convictions in such cases in the circuit court; and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the Solicitor's fee taxed for such conviction in the circuit court, and this solicitor's fee previously taxed in the county court or inferior court shall be paid, when collected, into the county treasury."

Yours truly,

CHARLIE C. McCALL,
Attorney General.

February 13, 1930.

The Treasurer,
Elba, Coffee County, Alabama.

(1) Witnesses—It is the duty of the County Treasurer to pass upon the legality of witness claims after certification of the facts authorizing such claims are made by the Clerk of the court.

(2) Witnesses—Witnesses are allowed mileage from the State line only.

(3) Witnesses—Witnesses cannot collect mileage in each case subpoenaed when such witnesses do not go to and from such county seat.

(4) Fine and Forfeiture Fund—Treasurer has right to correct or modify or refuse to pay claims in full that have been registered against the fine and forfeiture fund or any other fund, if he should later be convinced that such claims were not entirely legal.

(5) Witnesses—Witnesses are entitled to mileage for traveling to and from court anywhere in the State.

(6) Witnesses—Witness claims sold to script dealers and registered in said script dealers name are preferred claims over county officers court costs claims.

(7) Claims—All claims against counties must be presented for allowance within twelve months after the time they accrue or become payable, or the same are barred, unless it be due a minor, or to a lunatic, who may present such claims within twelve months after removal of such disability.

(8) Paupers—Paupers, who are not inmates of the poorhouse, may be maintained for a period not exceeding one month. Maximum limit

for burial of paupers may be fixed by the Court of County Commissioners.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 17, 1929, in which you request the opinion of the Attorney General on the following:

"1. Is the County Treasurer protected in registering state witness claims proven and authenticated by Circuit Clerk if the clerk makes a mistake in the legality of said claims? Can the Treasurer be held responsible for registration and payment of such claims?

2. Is mileage traveled in another state coming to court in this state legal claim against fine and forfeiture, or should said witness be allowed mileage from state line only?

3. Can a witness collect mileage in each case subpoenaed when such witness does not go to and from said court or county seat each day; that is to say if he should come from another state as witness in several cases for some week or term of court and stay in town, or near by, can he collect mileage from his home in another state in each case he may be summoned?

4. If Treasurer should register claims against fine and forfeiture or any other fund, and later be convinced that such claims were not entirely legal, would he have the right to correct or modify such claims, or refuse to pay them in full?

5. Is mileage, proved and authenticated by circuit clerk, or more than one hundred miles each way a legal claim? Is the treasurer justified in registering and paying such mileage?

6. Are state witness claims that have been sold to script dealers and registered in said dealers name, a preferred claim over county officers court cost claims of prior registration? Are individual witness claims preferred over county officers claims?

7. How do witnesses collect their claims that have been paid into treasury by order of the examiner, because of being held too long? These claims not being registered by the treasurer, or listed with him, would they have to be registered and await their turn, or would they be preferred and due on presentation? How can I know they are same claims paid in by circuit clerk?

8. Is it legal for the board of County Commissioners and Probate Judge of Coffee County to maintain, or contribute, to the support of several negro paupers in different parts of the County, under care of several different white and colored people? Is there any limit to coffins and burial expenses of county paupers fixed by law?

In my opinion answers to your questions should be as follows:

1. It is the duty of the County Treasurer to pass upon the legality of witness claims after certification of the facts necessary to make such claims charges against the fine and forfeiture fund and certified to by the clerk

of the court. Section 3766, Code of Alabama, 1923. Such being the case the treasurer would be held responsible on the bond for payment of illegal claims. If the clerk made mistakes as to the facts, that, of course, is a different proposition.

2. Witnesses are allowed mileage from the State line only. Opinion of Attorney General to Hon. L. B. Clark, Elba, Ala. Vol. 2, page 196, (Office Edition).

3. Witnesses cannot collect mileage in each case subpoenaed when such witnesses do not go to and from said county seat each day. Section 3770, Code of Alabama, 1923, provides that a witness is entitled to claim only his per diem in one case, if he be witness for more than one case on the same day.

Opinions of Attorney General, Vol. 3, p. 64, (Office Edition).

Reasoning by analogy the above conclusion, in regard to your question, seems to be correct.

4. The treasurer has a right to correct or modify or refuse to pay in full claims that have been registered against the fine and forfeiture fund or any other fund, if he should later be convinced that such claims were not entirely legal. Section 3766, Code of Alabama, 1923, provides that it is his duty to register such claims and if after registering same he finds himself in error, and no money has been paid out, there is no reason why he should not correct same, because if he paid out money on such an illegal claim, he would be liable on his official bond.

5. Witnesses are entitled to mileage for traveling to and from court anywhere in the State of Alabama.

Opinions of Attorney General. (Vol. 2, p. 196, Office Edition.)

6. Witness claims sold to script dealers and registered in said dealers name are preferred claims over county officers' court costs claims of prior registration, as Section 4039, Code of Alabama, 1923, provides; "that when registered claims of **said witnesses have been paid**, the county treasurer of such county must pay the fees of officers of court arising from criminal cases from the defendant on conviction, etc." Said script dealers stand in the shoes of the witnesses.

7. Not fully understanding this question I wish to refer you to Section 228, Code of Alabama, 1923, which I hope will give you the information you desire. Said Section reads as follows:

"All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claims within twelve months after the removal of such disability."

8. It is not legal for the board of county commissioners or judge of probate to maintain or contribute for the support of negro paupers under the

care of white and colored people for a period exceeding one month. Section 2796, Code of Alabama, 1923, provides for a temporary relief of paupers not exceeding one month, until they can be removed to a poorhouse.

Opinions of Attorney General, Book 13, p. 332, (Office Edition).

After September 30, 1929, appropriations cannot be made for paupers who are inmates of a county or district home, except in such cases as are provided for in an Act approved Sept. 9, 1927, (General Acts 1927, p. 521).

Opinions of Attorney General, Book 14, to Judge of Probate, Chilton County, Sept. 27, 1929, (Office Edition).

The maximum limit for burial of paupers may be fixed by the Court of County Commissioners as provided for by Sections, 2791, 2801 and 2802, Code of Alabama, 1923.

I hope that the above will give you the information you desire.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 13, 1930.

The State Tax Commission,
CAPITOL.

Licenses:—Penalties for delinquency should be collected by Judges of Probate when licenses are issued, provided that proper citation has been issued and served by license inspector and reported to the Judge of Probate.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of November 15, 1929, in which you state as follows:

One or two cases have arisen where persons properly cited by the license inspector and where proper notice of delinquency has been given to the Probate Judge, have refused to pay license fees, and have tendered the amount of the license itself to the Probate Judge, and have demanded the issuance of the license without the fees legally due the license inspector.

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Have Probate Judges under the circumstances stated in the above statement of facts, the right to issue licenses on the payment of the proper amount of the license itself without collecting the fees legally due the license inspector?

Section 72 (p. 139, Acts 1927) in part reads as follows: "The license inspector shall forthwith cite such delinquent to appear before him at the courthouse of the county in which said citation is issued and show cause why the license or privilege tax required by law has not been paid and if such license is due, then the license inspector shall cause the delinquent to appear before the probate judge of the county and take out the same, but such probate judges shall not have the authority to determine the liability of such delinquent for such license, and shall in each case issue license to the applicant therefor upon the payment by him of the amount or amounts prescribed in this Act." In the same section of the Act there appears the following provision: "For performing the duties required by this section, the license inspectors are entitled to be paid by the delinquent in addition to the license, fifteen per cent of the amount of the license so collected from each delinquent, which must be paid in all cases if report has been made to the judge of probate of such delinquency."

I am of the opinion that under the above quoted section of the revenue law, that when the license inspector has properly cited and reported the delinquent to the judge of probate, that it is the duty of the judge of probate when he issues the license to the delinquent to collect the license inspector's fees.

Attorney General's Report, 1918-1920, p. 350.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 14, 1930.

Alabama State Board of Public Accountancy.
2218 Comer Building,
Birmingham, Alabama.

Certified public accountant not authorized to practice as such in this State unless provisions of law have been complied with.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 15, 1930, in which you refer to Section 5253 of the Code of 1923, which section pertains to certified public accountants.

You request my opinion:

Can a person who is a certified public accountant under the laws of Georgia or some other state, use the abbreviation C. P. A. in this State without violating our law, provided such person also shows under his signature that he is a certified public accountant under the laws of Georgia or some other State?

In my opinion your question must be answered in the negative, because a person who is a certified public accountant under the laws of another state violates the laws of this State if he practices in this State as a certified public accountant, without having first obtained a certificate from the Alabama State Board of Public Accountancy, as provided by our laws.

An opinion was rendered by the Attorney General on December 17, 1919, to the Chairman of the State Board of Public Accountancy, (Biennial Report of Attorney General, 1918-1920, p. 368) on facts which were similar in many respects to the facts which you mention in your letter. This opinion contains the following statements:

"A New York firm, certified under the laws of that state, but not under the laws of Alabama, maintains an office in Alabama, using on its stationery, reports, and office sign, the following words, "Certified Public Accountants, New York." Their Alabama manager, who does work in this state, is not registered under the laws of any state. Is the Alabama act being violated?"

The Attorney General held the fact that the New York firm was issued a certificate under the laws of New York does not prevent the members of such firm from being liable to the criminal provisions of the statute in this State, and that while the law provides that the Board of Public Accountancy may issue certificates to the holders of certificates under the laws of other states, it does not compel the Board to issue such certificates.

Section 16, Code of Alabama, 1923, defines a certified public accountant.

Section 20, Code of Alabama, 1923, provides that the Alabama State Board of Public Accountancy may, in its discretion, register the certificate of any certified public accountant under the laws of another State, and may issue to such certified public accountant a certificate, which will entitle the holder to practice as such public accountant etc.

An accountant may practice his profession without a certificate from the Alabama State Board of Public Accountancy:

Lehmann v. State Board of Public Accountancy, 94 So. 94, affirmed by the U. S. Supreme Court in the case of *Lehmann vs. State Board of Public Accountancy*, 44 S. C. Reporter 128.

However, if a person desires to practice in Alabama as a certified public accountant, and to use the abbreviation "C. P. A." or any similar words or letters to indicate that he is a certified public accountant, he must first obtain a certificate from the State Board of Public Accountancy. The fact that persons have been certified as public accountants under the laws of other states does not exempt them from this requirement. They must comply with the law of Alabama on the subject.

Section 5253 provides that any person who shall represent himself to the public as having received a certificate under the laws of Alabama, to practice

as a public accountant, or who uses the abbreviation C. P. A. etc., shall be guilty of a misdemeanor.

If any person or persons violate the provisions of the above Section 5253, Code of Alabama, 1923, the matter should be brought to the attention of the solicitor of the county in which such provisions are violated, and he should prosecute such person or persons.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 14, 1930.

Superintendent of Education,
Ozark, Dale County, Alabama.

Schools—County Board of Education cannot pay subscriptions to educational publication from school funds.

County Board of Education pays expense of publishing annual report.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of November 20, 1929. You state that you would like to subscribe for the American School Board Journal and have same sent to you and to the members of your County Board of Education.

You request my opinion:

1. Can the County Board of Education pay for subscriptions to the American School Board Journal out of the bonus fund or from the general school funds of the County?

2. Who pays for the printing of the annual report of the County Board of Education and if the County Board of Education must pay for such printing, from what funds shall payment be made?

In my opinion the County Board of Education does not have authority to subscribe to the American School Board Journal and pay for same out of the bonus fund or from the general school fund of the county.

In my opinion the County Board of Education shall pay for the printing of its annual report from the general school fund of the county.

I rendered an opinion on May 20, 1929, to the Chief Examiner of Accounts, (Opinions of Attorney General Vol. 11, page 166, office edition) in which I held that school funds cannot be used to pay membership dues in the Alabama Education Association of the faculty members of a Normal School.

I have carefully considered the provisions of the School Code of 1927, and there is no authority therein for a County Board of Education to ex-

pend school funds in payment of subscriptions to educational publications, to be sent to members of the County Board of Education.

Section 123, School Code of 1927, provides for the publishing of the annual report of the County Board of Education. This section requires the County Board of Education to publish said report, but no provision is made for payment of expense of such publication. I am, therefore, of the opinion that such expense should be paid by the County Board of Education out of the general school fund of the county.

An opinion was rendered on April 30, 1926, to the Superintendent of Education of Barbour County, (Vol. 1 Opinions of Attorney General, 1926, p. 214, office edition) in which it was held that the County Board of Education is required to publish an annual report, and that since no provision is made for payment by the county for such publication, the expense of the publication must be borne by the County Board of Education.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 17, 1930.

The State Auditor,
CAPITOL.

Payment for stamps used by the Alabama Real Estate Commission must be made out of separate funds in the State Treasury from the deposit of fees and charges collected by said Commission.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of February 17, 1930, is hereby acknowledged. You ask my opinion out of what fund stamps for use of the Alabama Real Estate Commission should be paid.

In reply will say that necessary stamps used by such Commission in the discharge of its duties under Act No. 344 (Acts 1927, page 335 et seq.) constitute part of the expenses incurred by the Commission under the provisions of said Act. It is specifically provided by said Act as follows:

"All expenses incurred by the Commission * * * shall be paid out of the separate fund in the State Treasury upon warrants of the State Auditor upon the State Treasurer from time to time when vouchers therefor are exhibited and approved by the Commission and approved by the Governor.

"The State Treasurer is directed to pay money out of the separate fund hereinafter provided upon the order of the Secretary of the Board of Commissioners, countersigned by the Chairman of the Board of Commissioners and approved by the Governor, provided the total expenses

for every purpose incurred shall not exceed the total fees and charges collected and paid into the State Treasury, etc.”

It is difficult to see how the legislative intent could have been more clearly expressed. *Res ipsa loquitur*.

In my opinion the general provision in the general appropriation bill for payment of postage has no application where such payment is otherwise specifically provided for.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 17, 1930.

The State Health Officer,
CAPITOL.

Records—Local Registrars may issue legal certified copies of their records.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 31, 1930, in which you request the opinion of the Attorney General as follows:

1. Can local registrars issue legal certified copies of their records?
2. Can county health officers issue legal certified copies of their records of births and deaths in their records?

I am of the opinion that both questions should be answered in the affirmative. Section 1085, Code of Alabama, 1923, provides for the issuing of certificates by the local registrars. Said Section further provides in part as follows:

“When any such record book of births and deaths is filed, the local registrar shall deliver the same to the probate judge of the county and said judge shall cause such books to be properly labeled and indexed so as to constitute permanent local records of births and deaths. On the tenth day of each month each local registrar shall transmit to the State registrar all original certificates registered by him for the preceding month. And if no births or no deaths occurred in any month, he shall, on the tenth day of the following month, report that fact to the state registrar, on a card provided for such purpose.”

Section 1087, Code of Alabama, 1923, provides for the issuing of certified copies of the records by the state registrar.

There is no provision for the issuing of certified copies during the interim when the records are in the hands of the local registrar until the time he forwards same to the State Registrar and the Judge of Probate. This situa-

tion is fully met by the general provisions of Section 2694, 2695 and 2696, Code of Alabama, 1923. The local registrars are public officers in possession of public records.

Scott v. Culpepper, (in mss.) 6 Div. 469, Jan. 16, 1930.

Public records in the hands of public officers are subject to inspection by any citizen, and a certified copy is due to be given upon demand and the proper payment of the legal fee therefor.

Section 2696, Code of Alabama, 1923.

Macon Lbr. Co. v. Jones, 215 Ala. 157.

Scott v. Culpepper, *supra*.

The opinion of the Attorney General rendered on October 22, 1925, to W. Thurber Fales, State Registrar, Biennial Report 1924-1926, p. 270, being in conflict with this opinion is hereby overruled and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 18, 1930.

The Judge of Probate,
Columbiana, Shelby County, Alabama.

Where lands are assessed as a whole, and some person, entitled under Sections 3112 and 3113 of the Code, makes application to redeem a certain lot or parcel thereof, it is the duty of the judge of probate to ascertain and determine the value of the parcel or lot sought to be redeemed as related to the value of all the lands sold and use that proportion of the assessed valuation of all the lands for such redemption. The relative amounts of land is immaterial.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of November 8, 1929.

You ask my opinion upon the following:

Whether or not where several parcels or lots of land have been included in one assessment, without separate valuation, and have all been sold for taxes as provided by statute, and some mortgagee, or person other than owner, entitled to redeem a certain parcel or lot of said land, makes application to redeem such parcel or lot, it is the duty of the judge of probate to place a value on such parcel for redemption, or should the value of such parcel be figured at the same ratio that the acreage to be redeemed bears to the total acreage included in the assessment, placing the same valuation on each acre.

In reply will say that the manner of redemption in such a case is provided in Section 3113 of the Code. My interpretation of this Section of the Code is that in such a case as you mention, you should ascertain the proportionate value that the lot or parcel sought to be redeemed bears to the value of all the land sold. If the actual value at date of assessment of the parcel sought to be redeemed was equal to one half the value of all the land sold, then the valuation placed thereon by you for redemption should be one half the total assessed value of all the lands sold. It is immaterial what amount of the lands is sought to be redeemed; only its relative value is to be considered. There might be one hundred acres sold and ten acres thereof sought to be redeemed; if the ten acres sought to be redeemed was as valuable as the other ninety acres, then it should be valued, for the purpose of redemption, at one half the total assessed value of the hundred acres sold.

You should not place the same value on each acre, unless each acre was actually of the same value at date of assessment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 19, 1930.

Hon. J. E. Acker,
Deputy Solicitor,
Ozark, Alabama.

The act approved September 9, 1927, amending Section 5523 of the Code was not retroactive so as to provide for Deputy Solicitors a salary of twelve hundred dollars per annum from September 1, 1927.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of January 24th. You make the following statement of facts:

Under Section 5523 of the Code, 1923, the salary of Deputy Solicitors, in counties having twenty thousand population and less than thirty thousand population, was fixed at six hundred dollars per year payable in equal monthly installments. On September 9, 1927, this Section of the Code was amended making the salary of such Deputy Solicitors twelve hundred dollars per annum, payable in equal monthly installments.

You wish my opinion as to whether or not this Act amending Section 5523 of the Code, 1923, was retroactive so as to allow salary at twelve hundred dollars to begin on September 1, 1927, instead of on September 9, 1927, the day the Act was approved.

In reply will say that I find nothing in the Act which indicates an intention to make the Act retroactive. If such intention was clearly expressed in

the Act, the Act would be in contravention of Section 68 of the Constitution of Alabama.

In my opinion you were in error in drawing salary at the rate of twelve hundred dollars per annum for any time covered prior to date the amending went into effect.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 24, 1930.

The Judge of Probate,
Scottsboro, Jackson County, Alabama.

An ordinary rental contract, for a year or term of years, containing nothing more than an agreement to pay a monthly amount of money for rent, with no provisions as to purchase, or sale, does not require the payment of a privilege recording tax.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of Feb. 20th, with copy of rental contract between J. C. Jacobs and J. A. Proctor, parties of the first part and T. W. Flowers and C. W. Cook, parties of the second part.

You ask to be advised of my opinion as to whether or not this instrument is subject to a deed or mortgage tax, and, if so, what amount.

In reply will say that in my opinion, the instrument is not a deed, bill of sale nor instrument of like character, within the meaning of Section 21½ of Act No. 163, approved July 22, 1927, (Acts 1927, p. 163); hence, it does not take a deed filing tax. It certainly does not require a mortgage filing tax. I am, therefore, of opinion that the instrument, a copy of which you attached to your letter, does not require a privilege filing tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

February 24, 1930.

The Judge of Probate,
Huntsville, Madison County, Alabama.

Charter fee for filing certificate of industrial corporation in office of judge of probate is one dollar on each one thousand dollars of the proposed capital stock as shown by the certificate. Code 1923, Section 6969.

Where shares of capital stock have no par value, each share, for the purpose of ascertaining the amount of the charter fee, must be considered as of the value of one hundred dollars, unless shown to be of a different value to the satisfaction of the judge of probate.

It is immaterial that part of the proposed capital stock has not been sold.

Opinion by Assistant Attorney General Evans.

Dear Sir:

As requested in your letter of November 4, 1929, to Hon. S. H. Blan, State Auditor, he delivered to me declaration of incorporation of "Seidman Braid and Fabrics Corporation."

I presume from correspondence between you and Mr. Blan that you desire my opinion as to amount of charter fee due on filing such declaration in your office.

The certificate provides that the total amount of authorized capital stock of said corporation shall be three thousand shares, which shall be divided into one thousand shares of preference stock of the par value of one hundred dollars each and two thousand shares of common stock without nominal or par value. Said certificate also provides that the amount with which said corporation will begin business shall not be less than twenty five per cent of the authorized capital stock.

Section 6969 of the Code, 1923, reads as follows:

"Charter fees, amounts and how paid.—At the time the certificate is filed in the office of the judge of probate, the incorporators shall pay to the judge of probate for the use of the state one dollar for every one thousand dollars of the proposed capital stock, but in no case less than five dollars."

Section 7012 of the Code, 1923, provides that for the purpose of the taxes prescribed to be paid on the filing of any certificate or other paper relating to corporations, and of franchise taxes, prescribed to be paid by corporations to the State of Alabama, but for no other purpose, shares of capital stock without par value shall be taken to be of the value of one hundred dollars per share, unless it shall be shown to the satisfaction of the officer with whom such certificate should be filed, or to the officer with whom such report of franchise taxes should be filed, that such shares are of another and difference value than one hundred dollars per share, in which event such shares shall be

taken to be of a par value equivalent to such other or different value as so shown.

It will be seen from reading said Section 6969 of the Code, that the charter fee is one dollar per thousand of the proposed capital stock. The certificate of incorporation in the case under consideration shows clearly that the proposed capital stock is three thousand shares, divided into one thousand shares of preference stock of the par value of one hundred dollars each, and two thousand shares of common stock without nominal or par value. By Section 7012 of the Code, these two thousand shares of common stock, with no par value, are to be considered, for the purpose of ascertaining the amount of the charter fee, on filing the certificate in the office of the probate judge, as of the value of one hundred dollars per share, unless a different value is shown to the satisfaction of the probate judge.

Nothing to the contrary being shown by the certificate offered for filing, or otherwise, with reference to the proposed no par value stock, I am of the opinion that the charter fee in question amounts to three hundred dollars.

It will be kept in mind that the amount of charter fee is dependent upon the amount of the proposed capital stock. It is immaterial that some of the shares of capital stock have not been sold at the time of offering the certificate for filing.

I am herewith returning the certificate of incorporation of the "Seidman Braid and Fabrics Corporation" upon which the foregoing opinion is written.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 3, 1930.

The Clerk of the Circuit Court,
Anniston, Calhoun County, Alabama.

Costs: When sentence is suspended under Section 4488, Code of Alabama, 1923, execution may issue against defendant for costs; and if returned "no property found", costs may be paid out of fine and forfeiture fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of December 9, 1929, in which you state:

"A defendant was convicted of Non-Support, etc., of wife and children, and fined the sum of \$99.99. Upon his failure to pay the said fine and the costs of the prosecution, the defendant was duly sentenced to hard labor in lieu thereof.

"The Court then proceeded under Section 4488 of the Code to enter an order suspending such judgment and sentence, and directing the release of the said defendant upon his entering into bond without surety with the conditions as provided in said Section."

You request my opinion:

What am I to do about the cost that has accrued in this case?

I note that you say that the judge under and by authority given him by Section 4488, Code of Alabama, 1923, suspended the sentence in the above case.

It is my opinion that the Judge was without authority to suspend the sentence except for the amount of fine, viz., \$99.99 and that the cost of the proceedings stand against him for which execution may issue; and then if returned "no property found", such cost in said case, as is provided for by an Act of the Legislature approved February 18, 1927, (General Acts, 1927, p. 45) may become a charge against the fine and forfeiture fund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 6, 1930.

The Clerk of the Circuit Court,
Dothan, Houston County, Alabama.

Court Costs: Where convict is tried, convicted and sentenced to death and sentence is commuted by Governor to life imprisonment the clerk must have statement of commutation entered on record of court under the direction of presiding judge, and send copy of judgment entry and sentence, and statement of commutation as recorded on records of Circuit Court before cost bill can be paid by Convict Department.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 23, 1930, in which you state that the Convict Department is holding up payment of the cost bill in the case of State of Alabama v. Bryant Bass, who was tried and convicted of murder in the Circuit Court of Houston County and sentenced to death. The death sentence being commuted to life imprisonment by the Governor.

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Where a person is tried, convicted and sentenced to death and his sentence is commuted to life imprisonment by the Governor is the clerk required to send a copy of the judgment entry and sentence as provided

in Section 3609 of the Code of 1923, before the Convict Department can pay the court costs?

I am of the opinion that where the death sentence is commuted by the Governor, it is his duty to cause a statement of such commutation to be certified to the clerk of the court in which the conviction was had, and the clerk must enter the same of record at the next ensuing session under the direction of the presiding judge; and such commuted sentence must be executed as if it has been rendered by said court, as provided in Section 5130 of the Code, 1923, which is as follows:

"5130. Commuted sentence certified to clerk of court and recorded and enforced.—When any sentence is commuted the governor must cause a statement of such commutation to be certified to the clerk of the court in which the conviction was had, who must enter the same of record at the next ensuing session, under the direction of the presiding judge; and such commuted sentence must be executed as if it had been rendered by said court."

When Section 5130 of the Code of Alabama, 1923, has been complied with, the convict stands convicted and sentenced in the Circuit Court in accordance with the terms of the commutation issued by the Governor, and the clerk should send to the Convict Department a copy of the judgment entry and sentence as provided in Section 3609 of Code, and a copy of the statement of commutation of sentence furnished the Circuit Clerk by the Governor and entered on the record under the direction of the presiding judge as provided in Section 5130 of the Code. When the statement of commutation issued by the Governor to the Circuit Clerk is received and entered on the record under the direction of the presiding judge, the convict stands sentenced to life imprisonment in the penitentiary in the Circuit Court as if the life sentence had been rendered by the court, and the costs must be paid as provided for in Section 3617 of the Code of Alabama, 1923, which is as follows:

"3617. Imprisonment on commuted sentence.—The president of the board must also receive into the penitentiary, on the written order of the governor, any convict whose sentence has been commuted, according to law, to imprisonment in the penitentiary, and must confine such person according to the terms of the commutation, and the rules and regulations established by law; and if the governor shall so direct, the cost of conviction in such case must be paid as in case of sentence to imprisonment in the penitentiary."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 6, 1930.

The Judge of Probate,
LaFayette, Chambers County, Alabama.

Fine and Forfeiture Fund—may be transferred to the general fund of the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of February 15, 1930, in which you state that you have in Chambers County about five or six hundred dollars to the credit of the fine and forfeiture fund and that at the last session of the Commissioners Court of your County this amount was placed to the credit of the general fund of the County by order of said Court.

You request my opinion:

Can this transfer be legally made?

It is my opinion it can. This is regulated by Section 304, Code of Alabama, 1923 and is as follows:

"304. Transfer of fine and forfeiture fund to general fund.—The county treasurer of any county in this State may transfer any balance on hand at the end of the fiscal year of the fine and forfeiture fund in excess of the registered claims and lawful claims or charges against said fund to the general fund or to any special fund to which by resolution of the board of revenue, or court of county commissioners, expressed in writing and spread upon the minutes of the court, he may be directed."

You will observe from the above quoted section that this can be done only when there is a balance on hand at the end of the fiscal year of the fine and forfeiture fund in excess of the registered claims and lawful claims or charges against said fund. And this must be done by proper order of the Court of County Commissioners.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 7, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

1. License—Automobile dealer only required to take out license in counties in which said dealer has an established place of business, and not in every county in which said dealer does business.

2. License—If a dealer has more than one established place of business in the same county, he is liable for a license for each additional established place of business.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 18, 1929, together with other correspondence, in which you request my opinion as follows:

1. Is an automobile dealer required to pay a license in each county where he sells or attempts to sell automobiles, or is said dealer only required to pay a license in counties where he has an established place of business?

2. If a dealer has more than one established place of business in any one county is he required to pay a license for each established place of business?

In answer to your first inquiry, I am of the opinion that a license is required only in the counties in which the dealer has an established place of business, and not in every county in which said dealer does business.

Schedule 6 of Section 334 of the Revenue Laws of 1929, (Acts 1927, p. 139, Schedule 18½) provides as follows:

"Schedule 6. Agents or dealers in automobiles.—Upon each and every agent of and dealer in, and upon every person soliciting orders for the sale or purchase of automobiles, motor cars or other self propelling vehicles, except motorcycles, and except any person regularly employed by a said agent of or dealer in, which said agent of or dealer in has paid the regular tax or license herein provided for, the following privilege tax or license shall be collected, to-wit:

"In each county having a population of twenty thousand people or less, twenty-five dollars; in each county having a population of more than twenty thousand and less than forty thousand inhabitants, fifty dollars; in each county having a population of forty thousand and less than sixty thousand inhabitants, seventy-five dollars; in each county having a population of sixty thousand and less than one hundred thousand inhabitants, one hundred dollars; in each county having a population of one hundred thousand inhabitants or more, one hundred and twenty-five dollars; Schedule 10 of Section 361 of an Act to provide the general revenue of Alabama approved Sept. 15, 1919, is hereby repealed."

In construing said Section the Supreme Court of Alabama upheld the decision of the Court of Appeals in the case of the Peoples Auto Company v. The State, 120 So. 908. Said decision holds that said schedule does not require an automobile dealer to take out a license in each county in which he solicits orders for cars, but merely one State and County license to be taken out in the dealer's home county.

However, I am of the opinion that if such dealer establishes a regular place of business in another county than the one for which he first pays license, he is liable for a license in the county where each additional established place of business may be located.

In answer to your second inquiry I am of the opinion that if a dealer has more than one established place of business in the same county, he is liable for a license for each additional established place of business.

Opinions of Attorney General, Biennial Report, 1922-24, p. 74.

All former opinions or parts thereof in conflict with this opinion are hereby overruled and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 7, 1930.

Hon. Sam T. Huey,
Deputy Probate Judge,
Bessemer, Jefferson County, Alabama.

Shot gun shells—No license required on shot gun shells having a container made partly of metal and partly of paper.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 22, 1930, in which you refer to Schedule 83, p. 426 of the General Acts of 1919.

You request my opinion:

Does the above Schedule 83 provide for a license on shot gun shells if the container is made partly of metal and partly of paper?

In my opinion said Schedule 83 does not provide for a license on the shells described above.

Schedule 83 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 426) provides a license on metallic ammunition. In my opinion shot gun shells having a container which is made partly of metal and partly of paper are not classed as metallic ammunition.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 7, 1930.

The Judge of Probate,
Grove Hill, Clarke County, Ala.

Peddlers—Method of ascertaining amount of license to be paid by peddlers.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

Some time ago you wrote me and referred to Schedule 137 of the Compilation of Revenue Laws of Alabama of 1929. You stated in your letter that said Schedule provided that peddlers of merchandise should pay a license of \$15.00 for each county in which they peddle, and also provided that when traveling in vehicles they should pay \$35.00 for each county in which they travel.

You request my opinion:

Does the manner in which peddlers travel regulate the amount of license which they are required to pay?

In my opinion the manner in which peddlers travel, does, in certain instances, regulate the amount of license which they are required to pay.

Schedule 80 of Section 351 of an Act approved September 15, 1919 (General Acts 1919, p. 425) contains the following provisions:

"Peddlers of medicine or other articles of like character, one hundred dollars for each county in which they peddle, fifty dollars of said amount to be paid to the county, said fifty dollars being the county license.

"Peddlers of merchandise other than medicine, fifteen dollars for each county in which they peddle.

"Peddlers, except peddlers of medicine, who are otherwise licensed and except peddlers of tinware, woodenware, stone or clay hollowware, tanners who manufacture leather goods, when traveling in vehicles shall pay thirty-five dollars for each county in which they peddle."

You will observe from the above provisions that peddlers of merchandise other than medicine are required to pay a license of \$15.00 for each county in which they peddle. This provision applies to peddlers of merchandise other than medicine, who do not travel in vehicles.

You will observe from the above provisions that all peddlers, except peddlers of medicine and peddlers of tinware, woodenware, stone or clay hollowware and tanners who manufacture leather goods must pay a license of \$35.00 for each county in which they peddle, if they travel in vehicles.

Yours truly,
CHARLIE C. McCALL.
Attorney General.

March 7, 1930.

The Judge of Probate,
Dothan, Houston County, Alabama.

Board of Revenue—May erect storage tank for storing gasoline to be used in maintenance of county roads, to be paid for out of gasoline fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 25, 1929, in which you state the following facts:

"The Board of Revenue of Houston County is planning the erection of a storage tank for storing gasoline to be used in the maintenance of county roads. It contemplates the lease of a tract on the right of way of the railroad on which to erect such storage tank. It is contemplated to erect on this leased tract a small house or enclosure for storing oils for similar purposes, that is, for use in machinery for maintenance of roads. It will be necessary to purchase storage tank, supports for same, foundation material, brick and other materials and labor for the erection and completion of such tank and small house, for oils, greases and perhaps office space for records for the operation of the proposition."

You request my opinion as to whether or not the County would be justified or authorized to pay all of these expenditures out of the gasoline fund?

I am of the opinion the question should be answered in the affirmative.

Section 83 of the Revenue Act of 1923, (General Acts 1923, p. 197), provides that all funds derived by the several counties from said tax should be expended exclusively for the maintenance and repair of roads, highways and bridges in said counties.

Under this section of the Act the funds derived from the gasoline taxes may be used only for the purposes expressly provided for by the terms of said Act.

Biennial Report of Attorney General, 1926-1928, pp. 119 and 329.

In my opinion, the erection of a storage tank for storing gasoline to be erected in the manner above described, to be used exclusively in the maintenance of County roads, would be a legal charge against the gasoline fund of said county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 8, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

Attention: Hon. John S. Mooring.
Licenses—Bankrupt sales.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 25, 1929. In it you state that a party living at Cordova, Alabama, has been conducting a bankrupt sale. This party claims that in advertising and selling this stock of goods as bankrupt she is acting for the referee or trustee in bankruptcy and she is not, therefore, liable for license for conducting such sale. You state further that in fact she is not representing the referee or trustee in bankruptcy, but that she purchased the stock of goods from the referee or trustee in bankruptcy and after purchasing the same she advertised and conducted the sale in her own name and for her own benefit, at different times buying in the market and adding goods to the stock and selling these goods along with goods of the bankrupt estate, styling the sale as a bankrupt sale.

You request my opinion:

Is this party liable for a license for conducting such sale ?

I am of the opinion she is, and would come under Schedule 51 of an Act approved September 15, 1919, (General Acts, 1919, page 411). If the party you refer to above is advertising this stock and selling this as bankrupt it could make no difference whether she purchased it from the referee or trustee of the bankrupt estate or otherwise. The license is required for advertising and conducting such a sale and the party before advertising and conducting such sale must make application to the Probate Judge for license authorizing such sale and must follow the provisions of this Schedule strictly in making application for such license.

Biennial Report of Attorney General, 1926-1928, p. 39.
Biennial Report of Attorney General, 1926-1928, p. 65.
Biennial Report of Attorney General, 1926-1928, p. 400.
Biennial Report of Attorney General, 1926-1928, p. 662.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 10, 1930.

The Judge of Probate,
Tuscumbia, Colbert County, Alabama.

Court of County Commissioners—Members not entitled to mileage for attending sessions from day to day.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 20, 1930, in which you state that each member of the commissioners court resides several miles from Tuscumbia, and that when the court is in session and adjourns from day to day they usually find it necessary to go home in the afternoon after the business of the day is disposed of.

You request my opinion:

1. Are the members of the commissioners court entitled to mileage for each day that they travel from their homes to the courthouse to attend the sessions of the court?

2. If the members of the Commissioners court are not entitled to mileage for each day that they travel from their homes to Tuscumbia to attend the sessions of their court, are they entitled to mileage for attending sessions of the court in cases where the court has adjourned to meet again after a vacation of one or more days?

In my opinion both of your questions must be answered in the negative.

Section 6771 of the Code of Alabama, 1923, contains the provision that each member of the court of county commissioners and board of revenue shall be paid the sum of \$3.00 per day for their services, and five cents per mile in going to and returning from their respective courts. In my opinion, this provision permits members of the court of county commissioners or board of revenue to be paid for attending regular sessions of the court, but does not entitle them to mileage for attending court from day to day, or to mileage for attending court after the court has adjourned for one or more days.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 10, 1930.

Hon. J. D. Russum, Coroner,
Birmingham, Jefferson County, Alabama.

Coroners—Coroner entitled to compensation of both sheriff and coroner when discharging duties of each office at the same time.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 5, 1930, in which you state that commencing October 12, 1928, until December 10, 1928, inclusive, you served Jefferson County as both Sheriff and Coroner. For this service you received the sheriff's salary but have not yet received any salary as coroner for the period of time mentioned above.

You request my opinion as to whether or not you are also entitled to your salary as coroner for the time mentioned above.

I am of the opinion you are entitled to compensation as coroner as well as sheriff for the time you served in both capacities.

An opinion of the Attorney General rendered December 5, 1928, to the Treasurer of Jefferson County (Book 8, p. 229, Office Edition) held that the coroner of Jefferson County, while performing the duty as sheriff, should receive the same compensation as the sheriff. That is, he should receive the same salary that the sheriff received.

Section 161, Code of Alabama, 1923, provides that the coroner must discharge the duties of the sheriff under certain circumstances. This provision is mandatory. By said coroner acting as sheriff, he does not vacate the office of coroner. He is still bound to fulfill the duties of coroner as well as those of the sheriff. Acting as sheriff is merely an ex-officio duty of the coroner for which he receives the same compensation as the sheriff. The fact that he does receive compensation as sheriff does not preclude him from receiving his compensation as coroner. He performs the duties of two officers and should receive the compensation of both.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

The State Tax Commission,
State Capitol,
Montgomery, Alabama.

March 11, 1930.

License Tax—Ship brokers representing non-resident principals exclusively not subject to license tax provided for in Schedule 121, Acts 1919, p. 437.

Opinion by Assistant Attorney General Smith.

Dear Sirs:

I have your letter of January 25th, 1930, in which you state as follows:

"In Mobile, there are a number of persons whose business subject them to license under provisions of Schedule 121, Acts 1919, p. 437.

"Most of these persons take out license under this schedule but some of them are refusing to take out and pay for this license on the ground that the State has no authority to levy this license because of the provisions of the Federal Government giving to Congress the sole right to regulate commerce between the State and exports."

Upon this statement of facts you request the opinion of the Attorney General on the following question of law:

Should License Inspector at Mobile proceed to institute regular proceedings for the collection of this license in the event persons, firms or corporations conducting a business of a "ship broker" as provided in Schedule 121, Acts 1919, p. 437, fail to take out and pay for said license?

Your statement of facts do not disclose whether or not the "ship brokers" who refuse to pay license are representing non-resident principals exclusively or whether they represent principals within the State of Alabama or whether they represent non-resident principals and principals within this State.

If the "ship brokers" represent non-resident principals exclusively, they are not liable for the license tax, but should such broker represent resident principals or non-resident principals and resident principals in their business then in that event, they would be liable for the tax as provided in Schedule 121, Acts 1919, p. 437.

The license tax thus imposed by the State of Alabama on "ship brokers" doing business in this State is not applicable to brokers who represent non-resident principals exclusively and if so applied the tax is an invasion of the commerce clause of the Constitution of the United States, and is unconstitutional and void.

Stratford v. City Council of Montgomery, 110 Ala. 619.

The License Inspector should ascertain the facts in each case as to the character of the business done by the "ship broker" and be governed by the law as above set out.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 11, 1930.

The Judge of Probate,
Linden, Marengo County, Alabama.

Taxation—License for sale of mules, horses, etc. Only one license required for county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 18, 1929, in which you state that a concern which sells horses, mules, etc., have taken out a regular license under Schedule 82 of the Revenue Laws of Alabama, 1929, to do business in Marengo County. They are making sales at Linden and other places in the County.

You request my opinion:

Does this license protect them in sales made anywhere in the County?

Schedule 82 of the Revenue Laws of Alabama of 1929 governs license of this character and is as follows:

"Schedule 82. Horse dealers.—For each person engaged in the business of buying, selling, or exchanging horses, mules, jacks, jennets, twenty dollars for each county."

It is my opinion that when a dealer complies with the above schedule and pays the license there prescribed he may conduct sales at any point in the county.

You will note the above quoted section provides among other things that this license shall be paid "for each county" and does not say for each designated place in the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 11, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

License—Only one State and County license required of cotton buyer.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of November 7, 1929, in which you request my opinion as follows:

Is a cotton buyer liable for a separate license in each county where he does business or only where he has his principal place of business?

Schedule 47 of Section 334 of the Revenue Laws of 1929 (Acts 1919, p. 282, Section 361, Schedule 35) provides as follows.

"Schedule 47. Cotton buyers.—Each person, firm or corporation whose principal business is buying cotton, twenty-five dollars, which shall entitle him to buy cotton in any county in this State."

Under this schedule a cotton buyer who has procured a license in compliance therewith can do business in any county in the State. Only one State license is necessary.

Section 335 of the Revenue Laws of 1929 (Acts 1919, p. 282, Section 362) provides as follows:

"335. License tax levied for counties.—There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm, or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent of the State license or privilege tax, except as herein otherwise provided."

The whole Revenue Law must be construed together. Section 335, *supra*, authorizes the county license of fifty per cent of that charged by the State. If no license is required by the State there can be none required by the county, except as otherwise expressly provided. There is no express provision to the contrary in the instant case.

Therefore, since only one State license is required of a cotton buyer, only the county, in which said cotton buyer has his principal place of business, can require a license of said cotton buyer.

An opinion of the Attorney General rendered August 4, 1921, to the Chairman of the Tax Commission, being in conflict with this opinion is herewith overruled and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 13, 1930.

The Treasurer,
Hamilton, Marion County, Alabama.
Counties.—Claims against the County when paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 15, 1930, in which you state:

"I am mailing you a copy of Mr. X's claim on Marion County for a survey made in the year 1925 and 1926 from Franklin County line through

Marion County by the way of Bear Creek to Haleyville in Winston County to the County line.

"This is a State Highway and is supposed to be a preliminary survey and to be paid by the County according to Mr. X's statement that is the part that was accepted by the State Highway.

"There are no orders on the minutes of the Commissioners Court giving X or any one else the right to make a preliminary survey in Marion County from Franklin County line to Winston County line.

"I have talked to the commissioners and they said that they did not sign any order giving X any right to make this survey. The copy which he claims was filed with the Court in August, 1926, is not recalled by the Court. In April, 1929, this claim was presented to the Court to be passed upon April 15 but the commissioners claim that they passed it over and did not grant the claim but any way there was a warrant issued 7 days after the court had adjourned April 22, 1929. Warrant No. 9481 for \$2,060.00."

You request my opinion:

Am I authorized under the law as County Treasurer to pay this warrant?

It is my opinion that you are without authority to pay the above warrant for the following reasons: first, if there was not a contract by and between the court of county commissioners and Mr. X and this contract based on a resolution of the commissioners court agreeing to employ the said Mr. X to do the work for which he has filed his claim, and said claim after the services were performed was not duly and properly audited and passed by the commissioners court, it is illegal and cannot be paid.

We are of the opinion that under the general term of Section 6754 Code of Alabama, 1923, the commissioners court may employ an engineer to locate and establish a county highway but this would have to be done by proper order and contract.

Second. Then again the claim as presented is barred by the statute of limitation. The work for which this claim is filed is for making preliminary survey of a highway in Franklin County was performed in 1926 and the claim on its face shows to have been filed on the eighth day of April, 1929, nearly three years having elapsed. All claims not presented for service within one year are barred. See Section 228, Code of Alabama, 1923, which is as follows:

"228. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

State ex rel City of Mobile vs. Board of R. R. Com. of Mobile County, 180 Ala. 514.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 14, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

1. When a county, by virtue of the first proviso of Section 215 of the Constitution, 1901, has collected sufficient money, by such a levy, to pay the debts existing on the sixth day of October, 1875, as allowed by said proviso, the exception there provided for to the general limitation in said Section, becomes exhausted and such levy cannot, legally, be further made.

2. Money collected from a levy and assessment of one-quarter of one per centum upon the taxable property in a county, made by virtue of the first proviso of Section 215 of the Constitution, 1901, for the purpose of paying debts existing on the sixth day of December, 1875, cannot legally be appropriated to any other purpose.

3. The appropriation of money collected under such a levy to payment of debts contracted or incurred since December 6th, 1875, for constructing roads and bridges, constitutes a misappropriation of such money.

4. A void levy constitutes no legal foundation for a valid assessment.

5. An unconstitutional levy constitutes no legal foundation for the collection of a tax.

6. The assessment under a void levy is mere color of authority, which may be defeated by a tax payer on showing the facts, which make it void.

7. When money is collected under an assessment permitted by the first proviso of Section 215 of the Constitution, it constitutes a trust fund for the purpose allowed by said proviso, and when deposited with the county depository, such depository has no legal right to pay it out for any other purpose than that for which it was levied.

8. The liability of the depository for paying out such money for a purpose other than that for which it was levied, depends upon whether or not the depository has violated the statutes regulating its duties.

Under the facts stated in the opinion, the bonds issued by the Board of Revenue of Barbour County in 1929, attempting to refund the bonds issued in 1899, and payable in 1929, are void.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of former date was duly received. You make the following statement of facts:

Prior to the sixth day of December, 1875, Barbour County contracted a debt in connection with aiding in the building of the railroad from Eufaula to Clayton.

This debt, not having been paid, was refunded in the year 1899, as provided by Section 1424 of Code of 1896, by issuing bond, payable in thirty years to the amount of Eighty Five Thousand Dollars. These bonds became due and payable in the year 1929. After issuing said bonds in 1899 and after the adoption of the Constitution of Alabama, 1901, and prior to the date of their maturity in 1929, the Board of Revenue of Barbour County, for the purpose of paying said bonds, with interest thereon, levied annually the tax on taxable property of Barbour County, at the rate of one-fourth of one per centum per annum, as provided by Section 215 of the Constitution of Alabama, 1901, for payment of debts existing on the sixth day of December, 1875. Such tax was annually assessed and collected.

Prior to the maturity of said bonds in the year 1929, a sufficient amount of such tax had been collected and turned over by the tax collector of Barbour County to the county depository to pay said bonds, with interest thereon. The amount so collected annually, over and above the amount necessary to pay the interest on said bonds, was used to pay debts created by the county since 1875 for the erection of necessary public buildings, bridges and roads.

During all these years the County of Barbour was levying, assessing and collecting all the taxes permissible under said Section 215 of the Constitution.

In the year 1929, when said bonds, called in the levies, assessments and collections, "railroad bonds," fell due, the Board of Revenue of Barbour County, not having on hand the money collected for payment on the bonds, by agreement with the bond holders, undertook to refund said indebtedness by issuing new bonds payable at some future date, bearing a given rate of interest.

Under the facts stated, you ask my opinion upon the following:

1. Can the County legally continue to levy the tax of one-quarter of one per centum upon the taxable property in the county allowed by Section 215 of the Constitution of Alabama for the payment of debts existing on the sixth of December, 1875, to be applied to the payment of said indebtedness?

2. Did the Board of Revenue of Barbour County have any authority of law to use the money so collected for any purpose other than the payment of said indebtedness?

3. Was not the use of said money for constructing roads and bridges for the county, a misappropriation of said money?

4. Has the Tax Assessor any authority of law to further assess the tax of one-quarter of one per centum upon the taxable property of Barbour County for the purpose of paying said railroad debt?

5. If assessed, has the tax collector any authority to collect such assessment?

6. Said money having been collected each year by the tax collector, under a levy and assessment for the special purpose of paying said indebtedness, which existed on the sixth day of December, 1875, and paid

over to the county depository and placed in a special account, known as the "Railroad Bond Account," did the County Depository have legal authority to pay out the money deposited to said account for any purpose other than the payment of the interest or principal of said bonds?

7. If the county depository wrongfully paid out such money, is the Depository liable to any one for such wrongful Act?

8. Having levied, assessed and collected under said first proviso of Section 215 of the Constitution enough money to pay the interest and principal of the bonds issued in 1899, prior to the date the same became due, did the Board of Revenue of Barbour County have authority to issue the bonds of 1929 for the purpose of refunding the old bonds.

In reply to your several questions will say:

A County has no inherent power of taxation. All the authority of a county to levy taxes must be given by the Legislature.—State v. Street, 117 Ala. 210.

The power of the Legislature to grant authority to a county to levy **ad valorem** taxes is limited by the provisions of Section 215 of the Constitution of Alabama.—State v. Street, 117 Ala. 210.

In the case of State v. Street, 117 Ala. above cited, the Supreme Court of Alabama, was construing Section 5 of Article XI of the Constitution, 1875, which Section was substantially, so far as questions now under consideration are concerned, the same as said Section 215 of the Constitution, 1901, and it must be presumed that said Section 215 of the Constitution, 1901, was adopted with that construction on it. Hence, we shall proceed, in this opinion, upon the theory that what was said by the Supreme Court in said case of State v. Street, in construing said Section 5 of Article XI of the Constitution of 1875, is applicable to Section 215 of the Constitution, 1901.

On reading said Section 215 of the Constitution, 1901, in the light of what the Supreme Court said in the case of State v. Street, it will be seen, first, that the Board of Revenue of Barbour County had and has no authority to levy **ad valorem** taxes on the taxable property in Barbour, other than that given by the Legislature; and that any authority given by the Legislature to the Board of Revenue of Barbour County must be construed as being limited by said Section 215 of the Constitution of 1901.

Without the limitations upon legislative power provided in Section 215 of the Constitution, the Legislature would be practically all powerful in granting authority to counties to levy **ad valorem** taxes. What then, are these limitations?

First, generally speaking, the authority of the Legislature in granting power to a county to levy **ad valorem** taxes upon the taxable property therein is limited to a rate not greater, in any one year, than one half of one per cent. To this general limitation of power, there are two exceptions; and the power of the Legislature with reference to these two exceptions is also limited. The first of these exceptions is written as follows:

"Provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected, which shall be appropriated exclusively to the payment of such debts and the interest thereon."

The second of these exceptions is written as follows:

"Provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of any necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges or roads, any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been, or may hereafter be, authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

It will be seen from the foregoing that a county has no inherent power of taxation. All the authority of a county to levy taxes must be derived from the Legislature. It will also be seen that the power of the Legislature to grant authority to a county to levy *ad valorem* taxes upon the property in a county is limited by Section 215 of the Constitution to a rate of one-half of one per cent thereon, except for the purposes named in the first and second provisos already quoted and copied.

Under the first of these provisos the Legislature may grant to a county authority to levy, upon the taxable property in the county, for the purpose of paying debts existing on the 6th day of December, 1875, a tax at the rate not exceeding one-fourth of one per centum. This is the exception which calls for consideration in answering your questions. It will also be noted that it is provided, in said proviso, that the tax so levied and collected shall be appropriated exclusively to the payment of such debt and interest. The use to which said tax shall be appropriated, when collected, is mandatory under the very terms of the Constitution.

Acting under authority of said exception provided by the Constitution of 1875, the Legislature enacted Section 1424 of the Code, 1896, which has been brought down in each Code since. This Section reads as follows:

"The Court of County Commissioners, if they deem it necessary, may, without increasing the indebtedness of the county, settle, or compromise and fund, the debt of the county existing at the ratification of the Constitution of 1875, and for the payment thereof may issue the bonds of the county, not running for a longer time than thirty years, not bearing an annual interest exceeding six per cent; and for the payment of the principal and interest of such bonds, may levy, annually, a special tax on the value of the taxable property in the county, as assessed for state taxation, not exceeding one-fourth of one per centum, which must be collected as state and county taxes are collected, and which must be applied exclusively to the payment of the principal and interest of such bonds."

In answer to your first question will say that, in my opinion, under the facts stated by you, the exception from the general limitation, allowed in Section 215 of the Constitution of 1901, has been exhausted, and any further levy of such one-fourth of one per centum on the taxable property in the county, in addition to all other taxes allowable, is illegal, as being in contravention of Section 215 of the Constitution, as well as in excess of the authority granted by the Legislature in Section 232 of the Code, 1923, Section 154 of the Code, 1907, and Section 1424 of the Code 1896.

When enough taxes to pay such bonds and interest had been collected, under such levy, the said exception provided in the Constitution for levying such tax was exhausted.

In answer to your second question will say that the Board of Revenue plainly had no authority of law to use the tax so levied and collected for any purpose other than that specifically provided, both in the Constitution and in the statute, viz., to pay debts existing on the 6th day of December 1875.

In answer to your third question will say that the use of such money, the proceeds of a tax so levied, assessed and collected, for constructing roads and bridges of the county, was clearly a misappropriation of such money.

In answer to your fourth question will say that since the Board of Revenue of Barbour County, under the facts stated, is utterly without authority to further levy such tax in addition to one-half of one per centum, its order, to that effect, is void and constitutes no valid authority upon which the Tax Assessor may make such assessment.

In answer to your fifth question, will say that, in my opinion, a void assessment constitutes no valid authority for a collection of the tax. It is color of authority merely, which may be successfully resisted in law by a tax payer on showing the facts which make the assessment void.

In answer to your sixth question will say that all the authority a County Depository has is that given by statute. Section 314 of the Code, 1923, provides for payment of money to the County Depository. Section 315 of Code, 1923, provides how accounts shall be kept by a depository and how money in its keeping shall be disbursed. Said Section 315 reads as follows:

"Accounts shall be opened and kept in said bank in such manner and funds as such board may direct, disbursements to be made upon the order of the Board of Revenue or Court of County Commissioners, and said bank shall furnish said board with a full and detailed statement of the receipts and disbursements on the second Monday of January and July in each and every year."

Section 317, of Code of 1923, reads as follows:

"The Board shall require adequate bond of said bank to secure the safety of said deposit, which bond shall be in the sum of fifty thousand dollars, or such other sum as the county commissioners or board of revenue shall fix, having due regard to the safety of the county funds."

Section 318 of Code of 1923, reads as follows:

"The bank or banks so designated as depositories for county funds shall be charged with all the duties and subject to the same liabilities, insofar as the safe-keeping and paying out of the funds of the several counties are concerned, as are now imposed by law upon county treasurers."

Section 321 of Code of 1923, reads as follows:

"All warrants drawn upon the depository must be signed by the probate judge of said county or the president of the board of revenue or court of county commissioners of the different counties at the election of such board of revenue or court of county commissioners, expressed in some resolution which must be spread upon the minutes and given to such depositories that may be selected. Such officer signing such warrant shall be liable for the amount of any warrant drawn and paid by such depository without the authority of law."

The money raised by such levy, assessment and collection, under the mandate of the Constitution and of the statute, when deposited with the depository, constituted, in my opinion, a trust fund, which could not legally be used for any purpose other than the payment of debts existing on the sixth day of December, 1875. It could not legally be used to pay any other obligation of the county than the one for which it was levied. To so use it, was a misappropriation of such money, for which some one is liable.

In answer to your seventh question, will say that, in my opinion, under the facts stated by you, either the depository is liable for such misappropriation under the provisions of said Section 318 of the Code, or the person signing the warrant on said fund under the provisions of said Section 321 of the Code. Not enough facts are stated for me to form an opinion as to which is liable. It depends upon which one has violated the law. This, however, is based upon the presumption that the Board of Revenue discharged its duty and the Tax Collector his duty, so that this fund could be distinguished upon the books of the depository.

In answer to your eighth question will say that, in my opinion, the bonds issued in 1929, were issued without authority of law and are void. This, however, does not invalidate the old bonds which have not been paid. These bondholders have a right to collect their money from the county, as well as from the person, or persons, guilty of misappropriation. It is my opinion that, if the county has gotten the benefit of the use of said money, it may legally pay it back to the fund from which it was abstracted. It is further my opinion that the holders of the bonds due in 1929, may proceed for the collection of said bonds under the Act of the Legislature by virtue of which the debt was allowed to be made.—*Edwards v. Williamson*, 70 Ala. 145. This was probably Act No. 172, approved Dec. 31, 1868, (Acts 1868, p. 514.)

It will be kept in mind that while the first proviso of Section 215 of the Constitution of 1901, provides that the county may levy an additional

rate of one-fourth of one per cent to pay debts existing on the sixth day of December, 1875, it does not prevent such debts from being paid out of the general levy of one-half of one per cent or from taxes collected for the county from other than *ad valorem* taxes, except where such other taxes are specifically appropriated by the Constitution or statutes to some other purpose.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 18, 1930.

County Treasurer,
Mobile, Mobile County, Alabama.

Counties: County Sinking Funds must be invested in bonds as provided in Section 61, Acts 1927, p. 550, and not in interest bearing warrants.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of July 13, 1928.

In it you state that the Municipal Bond Code (Acts 1927, p. 550, Section 61) provides for the investment of Sinking Funds of a county. The County of Mobile, on August 1, 1928, will issue some five year interest bearing warrants under authority of Acts of 1927, pp. 258-259. The county has funds necessary to buy the warrants, and the rate of interest is better than the savings banks offer.

You request my opinion:

Is Section 61 of the Act above cited broad enough to cover coupon interest-bearing warrants, as well as bonds, or must the word bond be literally construed?

Section 61 is as follows:

"Section 61. SINKING FUNDS:—All sinking funds provided for the retirement of bonds shall be invested in bonds of such subdivision, or in bonds of the United States of America, or in bonds of the State of Alabama, or in bonds of any County in the State of Alabama, or any municipal corporation of the State of Alabama, or deposited in bank on interest. All sinking funds created by resolution or ordinance heretofore adopted must be properly set aside each year in accordance with the resolution or ordinance provided for the same, and a report made thereof and filed with the clerk of the municipality or with the probate judge of the county, as the case may be, showing in detail how said sinking fund is invested or deposited. All contracts now in effect for purchasing sav-

ings certificates, under the law as it heretofore existed, shall continue as legal investments."

It has been held in a recent decision of the Supreme Court of Florida that there is a difference between a bond and a warrant.

"There is a vast distinction between warrants and bonds. Warrants are mere orders or drafts on the treasury, payable on presentation when funds are available, or at a fixed date with interest if authorized by statute, while bonds are obligations running through a series of years, payable at a definite time with a fixed rate of interest independent of presentation. Warrants may be assignable though they are not negotiable paper, unless made so by lawful authority. Bonds, like bank notes, bills of exchange, and other negotiable instruments, as a rule possess all the attributes of commercial paper or negotiability, and when so clothed are negotiable.

"A common requirement of the constitutions and statutes of many of the states is that the question of issuing bonds must be submitted to and approved by vote of the people; this fact, in the estimation of the purchasing public, creates a superior market for bonds, and has the effect of making them a more desirable security than warrants."

Marshall, Clerk of Circuit Court, vs. State, 102 So. 650.

I am of the opinion that Mobile County would not be authorized to invest its Sinking Fund in interest bearing warrants of the county, and the word bond must be literally construed as used in said Section 61, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 19, 1930.

The County Treasurer,
Mobile, Mobile County, Alabama.

Article used for preparing food, etc., for prisoners in county jail must be paid for by the Board of Revenue or Commissioners Court of the County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of Feb. 10, 1930, in it you state that the sheriff of your county has purchased a bread-slicing machine to be used in slicing bread for feeding prisoners in jail. The Board of Revenue of your county has issued a warrant for payment of same, which warrant has been presented to you for payment.

You request my opinion:

Am I as County Treasurer authorized under the law to pay this warrant?

I am of the opinion you are. Under Section 4878, Code of Alabama, 1923, provision is made for paying claims of this character. This Section reads as follows:

"4878. Expense of maintenance, etc., how paid.—The expense incident to the construction, maintenance, sanitation, healthfulness and hygiene of each county jail, prison, and almshouse in this State shall be paid out of the funds of the county in which such institution is located and of the town or city, if the institution be a town or city institution."

Biennial Report of Attorney General, 1926-1928, pp. 171, 210.

Biennial Report of Attorney General, 1920-1922, p. 144.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 19, 1930.

The Tax Collector,
Fort Payne, DeKalb County, Alabama.

Validity of Section 3048 of the Code of 1923, upheld by Supreme Court.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of February 14, 1930. You state that you have been informed by Mr. James Hawkins of Birmingham that the Court granted to tax collectors two per cent commissions on collection of special county and district taxes levied for school purposes. You ask if the information is correct.

In reply will say that, in my opinion, Mr. Hawkins' statement of the matter is correct. In the case of Board of School Commissioners of Mobile County v. American Surety Company of New York, 125 So. 906, the Supreme Court upheld the validity and integrity of Section 3048 of the Code 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 19, 1930.

Judge of Probate,
LaFayette, Chambers County, Ala.

Taxation—Courts of County Commissioners have no authority to levy gasoline tax in absence of legislative authority.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of December 12, 1929.

You request my opinion:

Would it be legal for Chambers County to levy a two cent tax on gasoline sold in Chambers County?

I am of the opinion that counties do not have authority to levy taxes other than those which are authorized by law.

Phoenix Carpet Company v. State, 118 Ala. 143.

Mills v. Court of County Commissioners of Conecuh County, 85 So. Rep. 564.

I am unable to find any legislative enactment, either general or special, which would authorize Chambers County to levy a tax on gasoline sold in said county.

Report of Attorney General 1926-28, p. 154.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 19, 1930.

The State Health Officer,
519 Dexter Avenue,
Montgomery, Alabama.

Health—Records of transportation companies may be inspected under Section 12 of the Agricultural Code of 1927.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 13, 1930, in which you state the following facts:

It is frequently rather difficult to obtain conclusive evidence that a dairy-man or cafe operator is violating the milk ordinance, because transfers of milk from the express office or truck line depot are generally made at night.

If the records of the transportation companies could be examined, proper evidence could be obtained in this respect.

You request my opinion as to whether or not there is any authority of law by which the records of said transportation companies may be examined in this connection.

I am of the opinion that such examination may be made through the Commissioner of Agriculture. Although the basic health laws of Alabama authorize health officers and their representatives to enter any place to enforce health laws, and to confiscate the commodities which are detrimental to public health, there is no authority whereby the Health Department or its agents may inspect the records of the transportation companies. But such may be done through the Agricultural Department.

Article 8 of the Agricultural Code of 1927, (Sections 48 to 73) is entitled "Dairy Products, Utensils, Measuring Devices and Testing Apparatus."

Section 48 of the Agricultural Code of 1927, provides as follows:

"48. Purpose of Article: Power of State Board of Agriculture.—The purpose of the provisions of this Article is to promote the dairying interest of the State, to secure to the public wholesome, clean and nutritious milk, cream, butter and by-products of the same, and to prevent frauds upon the public in connection therewith. The State Board of Agriculture shall have the authority and power, and it shall be its duty upon the recommendation of the Commissioner to promulgate such rules and regulations as are necessary to accomplish the declared purpose of this Article, and to secure the enforcement of the provisions of this Article, provided, however, that such rules and regulations shall not invade the domain of the public health laws or ordinances, nor restrict the powers of the State Board of Health, nor the local Boards of Health."

This article gives the State Board of Agriculture the authority to regulate dairy products, not inconsistent with the powers of the State Board of Health.

Section 12 of the Agricultural Code, provides as follows:

"12. Inspection of Books: Witnesses Examined.—The Commissioner or his duly appointed agents, shall have authority to inspect books, and records and to hear complaints, to administer oaths, to certify to all official acts, and to examine under oath in any part of the State, witnesses in any matter pertaining to their duties, and cause such examination to be reduced to writing. If any person who having been sworn by any of the above officers to tell the truth shall wilfully give false testimony, he shall be guilty of perjury; provided, also, that except in his report to the State Board of Agriculture, or the report of any of his agents to the Commissioner, or when called upon to testify in any court or proceeding at law, the presiding officer of the Board or any employee or agent thereof or of the Commissioner, who shall divulge

any information acquired by him from the private books, documents or papers of any person, firm or corporation, while acting or claiming to act under any authorization or designation, in respect to the confidential or private transactions, property or business of any person, firm or corporation, shall be guilty of a misdemeanor and such employee or agent shall be disqualified from acting in any official capacity in the Department."

This section gives the Commissioner of Agriculture or his duly authorized agents, general authority to inspect records, etc., for the purpose of carrying out the provisions of the Agricultural Code. The regulation of dairy products is one of the provisions of the Agricultural Code.

With the proper cooperation between the Health Department and the Department of Agriculture, I am of the opinion that the records of the transportation companies may be inspected to consummate the purpose referred to above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 19, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

License—There is no distinction between a second hand car and a new car dealer as regards a dealer's license.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 5, 1929, in which you request my opinion as to whether or not there is any license required of dealers of second hand automobiles.

I am of the opinion that the license is required of a dealer of second hand cars under Schedule 6 of Section 334, Revenue Laws of Alabama, 1929 (Acts 1927, p. 139, Section 18½). Said Section provides as follows:

"Schedule 6. Agents or dealers in automobiles.—Upon each and every agent of and dealer in, and upon every person soliciting orders for the sale or purchase of automobiles, motor cars or other self propelling vehicles, except motor cycles, and except any person regularly employed by a said agent of or dealer in, which said agent of or dealer in has paid the privilege tax or license herein provided for, the following privilege tax or license shall be collected, to-wit: In each county having a population of twenty thousand people or less, twenty-five dollars; in each county having a population of more than twenty thousand and less than

forty thousand inhabitants, fifty dollars; in each county having a population of forty thousand and less than sixty thousand inhabitants, seventy-five dollars; in each county having a population of sixty thousand and less than one hundred thousand inhabitants, one hundred dollars; in each county having a population of one hundred thousand inhabitants or more, one hundred and twenty-five dollars; Schedule 10 of Section 361 of an Act to provide the general revenue of Alabama approved Sept. 15, 1919, is hereby repealed."

Section 13 of an Act known as The Automobile Title Certificate Laws (Acts 1923, p. 320), levying a special tax on dealers in second hand cars was repealed by an Act approved January 28, 1927 (Acts 1927, p. 21). Therefore, Schedule 6 of Section 334 (Acts 1927, p. 139, Section 18½) supra, governs the license fees required of automobile dealers in general. Said Section deals with dealers of automobiles in general and makes no distinction between second hand car dealers and new car dealers. A second hand car dealer is as much an automobile dealer as a new car dealer.

An opinion of the Attorney General, (Biennial Report, 1924-1926, p. 79) in dealing with the ad valorem tax required of new and second hand cars says: "There is no difference in this respect between a second hand car and a new car." There was no distinction made in that respect, and there was none. The same rule is now applicable in regard to the license required of automobile dealers. Since the repeal of The Automobile Title Certificate Law, supra, there is now no distinction between second hand cars and new cars as regard to an automobile dealer's license.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 20, 1930.

Hon. D. S. Leatherwood,
Clerk, Board of Revenue,
Hayneville, Lowndes County, Ala.

Board of Revenue—without power to pay premium on liability insurance for trucks owned by the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 10, 1930. In it you state that the County of Lowndes is operating twelve trucks for the purpose of hauling gravel on the roads. They desire to take out liability insurance on these trucks.

You request my opinion:

Can the County take out such insurance and issue warrant against the County Treasurer to pay premium on same?

Commissioners Courts and Boards of Revenue are purely creatures of the statutes. They have no inherent rights or constitutional power. Whatever power they have is derived from legislation and, therefore, before they can do any act or perform any service they must be able to point to some direct statute or law authorizing it.

The State vs. Street et al., 117 Ala. 203.

Bice, County Treasurer, vs. Foshee, 97 So. 764.

Ensley Motor Company vs. O'Rear, 71 So. 704, 70 Ala. 145.

I am unable to find any statute or law authorizing your Board of Revenue to pay the premium on such liability insurance and it is my opinion should they do so it would be without authority of law.

Biennial Report of Attorney General 1926-1928, page 217.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 25, 1930.

Hon. Woolsey Finnell,
Alabama Highway Director,
CAPITOL.

Section 31 of the Highway Code of Alabama, 1927, construed with reference to right of way through municipality.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of March 19th to hand. You make the following statement of facts:

The "Town of Epes" is an incorporated municipality with less than five thousand inhabitants. The State Highway Department desires that the County of Sumter, in which the Town of Epes is situated, shall acquire the right of way through said town deemed necessary by the State Highway Department for construction of State Road Project 336-B, a road to be constructed under the provisions of the Highway Code of Alabama.

You ask my opinion as to whether or not, under the facts stated, the State Highway Department, under Section 31 of the Highway Code of Alabama, has authority to condemn such right of way at the expense of the County, provided the County shall fail or refuse to acquire the right of way.

In reply will say that, in my opinion, the power of eminent domain residing in the State may be exercised within the corporate limits of a municipality as well as elsewhere in the State. As said in *Steele v. County*

Commissioners, 83 Ala. 304, "the right of eminent domain antedates constitutions, and is an incident of sovereignty, inherent in and belonging to every sovereign state." In the case of *Jones v. Nashville etc.*, Ry. 141 Ala. 388, our Supreme Court quotes "Cooley's Constitutional Limitations," with approval, as follows: "in every government there is inherent authority to appropriate the property of the citizen for the necessities of the state, and constitutional provisions do not confer the power, though they surround it with safeguards to prevent abuse. The restraints are, that when private property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry must be paid."

Constitution of Alabama, Section 23.

The Legislature prescribes how and by whom and for what purpose the power may be exercised.—*New & R. Co. v. Karcher*, 112 Ala. 676. There is nothing in the Constitution of the State of Alabama, which forbids the exercise of the power of eminent domain for right of way for construction of public roads through the lands within the corporate limits of a city. It is perfectly evident that a public road may be built through a municipality without constituting one of the streets of a municipality if the exigencies of the situation demand it. The Legislature has full authority to authorize it. There is no where in the statutes or the Constitution a prohibition against the Highway Department building a highway through a municipality. It is my opinion Section 31 of the Highway Code of Alabama is just as applicable within a municipality as without a municipality. The State's authority does not end at the corporate limits of a municipality. There is nowhere in the statutes or the Constitution a provision against condemning a right of way for a State highway through a municipal corporation. The power given the State Highway Commission is statewide, in order to effect the purposes of locating and constructing State highways. The power given the State Highway Commission in Section 6 of the Highway Code with reference to paving the roadway only of streets in cities having a population not exceeding five thousand is cumulative and not exclusive. The words "roadway only" simply mean that the side walks and front yards shall not be paved. This is allowed, in my opinion, to avoid the expense and necessity of condemning rights of way in municipalities where streets are reasonably available for the purpose.

Where the exigencies of a situation, in the judgment of the State Highway Department, demand the locating and constructing of a road through a municipality, or there is no street reasonably available for the purpose, it becomes the duty of the County to acquire the right of way for the road so located, and if it fail or refuse to do so, the State Highway Department, by virtue of Section 31 of the Highway Code, has "authority, at the expense of the county, to acquire such right of way either by purchase or by the exercise of the right of eminent domain in condemnation proceedings, as is provided for under the laws of this State."

Of course, in locating a road through a municipality, the State Highway Department would have to exercise its discretion reasonably.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 25, 1930.

Hon. Bibb Graves,
Governor of Alabama,
CAPITOL.

Construction of Section 30 of the Code of 1923 with reference to selling cotton raised by convict labor.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of March 19th is acknowledged. You make the following statement of facts:

The State Board of Administration does some farming in giving employment to convicts. Among other things, it raises cotton. Some of the cotton raised is of a grade which cannot be used at present in the cotton mills belonging to the State and operated by convicts under control of said Board. It thereby becomes necessary to sell such cotton.

You wish my opinion as to whether or not said State Board of Administration has authority to enter into contract with the Alabama Farm Bureau Cotton Association as per copy of form of contract attached to letter, in order to sell such cotton through the agency of said Alabama Farm Bureau Cotton Association.

In reply will say that, in my opinion, it may, if in its judgment that is the best and most profitable way to the State for such cotton to be sold.

Section 30 of the Code, 1923, reads as follows:

"Rules and Regulations for government of convict system.—The state board of administration under the direction and control of the governor, shall have the charge, management and operation of the convict system of the state, and with the approval of the governor, may make all necessary rules and regulations for its own government and for the working and management of the convicts of the state, and all matters incident thereto."

It is my opinion that the disposing of the products of convict labor is a matter incident to the working and management of the convicts of the state and that such method of selling such cotton may be effected under the authority given by said Section 30 of the Code.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 25, 1930.

The Superintendent of Banks,
Banking Department,
CAPITOL.

Banks—Deposits of public funds, accepted by a State Depository in excess of the amount said depository was authorized to receive, is held in trust for the State and has preference over the general creditors of the bank.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 17, 1930, in which you state the following facts:

The Bank of Ensley, a State Depository, accepted \$4000.00 in excess of the amount they were authorized to receive as a depository. Said deposit was made by the Tax Collector of Jefferson County, in the name of the State Treasurer. Said bank became insolvent before the excess was forwarded to the State Treasurer, and is now in the hands of the Superintendent of Banks for liquidation.

You request my opinion as to whether or not this \$4000.00 would be a preferred claim over the general creditors of the bank.

I am of the opinion that your question should be answered in the affirmative.

Section 894, Code of Alabama, 1923, provides as follows:

"894. Deposits of state funds in depositaries by officers; checking out by state treasurer.—Any state or county officer in this state, having in his possession or under his control, funds or moneys belonging to the state, may place the same in a state depository to the credit of the state treasurer and subject to the check and orders of the state treasurer, but no state depository shall receive or have at any time an amount of said money or funds in excess of the face value of said bonds actually deposited by it with the state treasurer, nor in excess of the amount of its paid in capital stock, surplus and undivided profits."

Section 895, Code of Alabama, 1923, provides that in case a State Depository accepts deposits in excess of the amount they are authorized to accept, same must be immediately forwarded to the state treasurer.

The acceptance of the money in excess of the authorized deposit, was an unauthorized acceptance of the deposit by the bank in violation of Section 894, Code of Alabama, 1923, *supra*. Said depository was, or should have been, cognizant of this fact. The funds were public funds.

An unauthorized deposit constitutes a trust fund where the depository knows that the funds belong to the public, although the deposit is made by means of checks instead of actual cash, and although interest is paid on the unauthorized deposit.

18 Corpus Juris, 580.

Centralia v. United States National Bank, 221 Fed. 755.

Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or where, though acquired without fraud, it is against equity that it should be retained by him who holds it.

Zimmern v. Peoples Bank, 203 Ala. 21.

A "constructive trust" arises when the legal title to property is obtained by one in violation, expressed, or implied, of some duty owed to one who is equitably entitled thereto, and when the property thus obtained is held in hostility to the beneficiary's rights of ownership.

Fowler v. Fowler, 205 Ala. 514.

The acceptance of the unauthorized deposit by the bank created, in my opinion, a constructive trust in favor of the State for the money so deposited; the bank being the trustee and the State the cestuis que trust. Therefore, the \$4000.00 referred to above, should be paid to the State of Alabama, the same having preference over the general creditors of the bank.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

March 26, 1930.

The State Health Officer,
Montgomery, Alabama.

Health—A two dollar institute fee for defraying expenses for lecturer for public health nurses, cannot be added to nurses' expense accounts.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 11, 1930, in which you request my opinion as to the legality of a charge against the traveling expense item in the county budget for an institute fee of \$2.00 arranged to cover the traveling expenses of an instructor brought here by the State Board of Health to conduct a series of lectures on a technical subject for Public Health Nurses.

I am of the opinion that such claim is not a legal charge against the public funds of the State or County.

Public funds cannot be expended unless there is an expressed or necessarily implied authority for the expenditure.

Bice, County Treas. v. Foshee, 97 So. 764.

Ensley Motor Co. v. O'Rear, 71 So. 704,

Biennial Report of Attorney General, 1926-28, p. 217.

I am unable to find any statute, or the construction of any statute, that would allow the expenditure of public funds for the purpose above mentioned.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 26, 1930.

The Judge of Probate,
Clanton, Chilton County, Alabama.

Court of County Commissioners—no authority to pay expenses of securing location of United States Veterans Hospital in County.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 16, 1930, in which you state the following:

Your County was an applicant for the United States Veterans Hospital to be located in your County, and it was necessary to send a representative to Washington to present the County's case.

You request my opinion as to whether or not the Court of County Commissioners are authorized to reimburse this representative's necessary traveling expenses.

I am of the opinion that your question should be answered in the negative. I am unable to find any statutes or the construction of any statutes that would give the Court of County Commissioners the authority to draw such a warrant or the same to be paid.

A payment of expenses for attempting to secure a location of the United States Veterans Hospital in a County does not, in my opinion, come within the purview of Section 6755 (23) Code of Alabama, 1923—the same not being an industry or factory within the meaning of said subsection. Whatever power the Courts of County Commissioners or Boards of Revenue have is derived from the Legislature. They have no inherent or constitutional powers.

State vs. Street et al., 23 So. 807.

Weekly et al. vs. Henry, 204 Ala. 463.

Opinion of Attorney General, Book 16, p. 96, (office edition).

And they cannot appropriate the public funds of a county except for the purposes expressly provided for by the Statutes.

Opinion of Attorney General, Book 16, p. 25 (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 26, 1930.

The Judge of Probate,
Clayton, Barbour County, Alabama.

Section 9023 of Code, 1923, construed.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of February 15th is acknowledged.

You wish my interpretation of Section 9023 of the Code of 1923.

In reply will say that, in my opinion, the meaning of said Section is, that when a mortgage, or deed of trust, which is of record, has been fully paid or satisfied, the mortgagor, or judgment creditor or other creditor of the mortgagor having a lien or claim on the property mortgaged, or a purchaser from the mortgagor, or the owner of the lands mortgaged, or a junior mortgagee, or the debtor in a deed of trust, may, in writing, request the one, who has received, and was entitled to receive, payment or satisfaction of such mortgage or deed of trust, to enter the fact of payment or satisfaction on the margin of the record of the mortgage or deed of trust.

When such request is made, the one so requested must, in person, if an individual, or by a duly authorized officer of the corporation, if a corporation, make such entry; or such entry may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances, and filed for record.

Such entry, in my opinion, whether made by the one receiving payment, or by his attorney in fact, should be witnessed by the judge of probate, or his clerk, who, in his official capacity, must attest such satisfaction.

The statute says: "Such entry must be witnessed by the judge of probate, or his clerk, who, in his official capacity, must attest said satisfaction; or satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances, and filed for record." It will be observed that the foregoing part of Section 9023 of the Code is one entire sentence. The latter part of the sentence evidently cannot be considered as an alternative of what precedes the word "or" in the sentence; but, in my opinion, must be considered as an alternative of what is said in the first sentence of the Section with reference to **who shall enter** such satisfaction. The part of the sentence preceding the word "or" was, in my opinion, intended to apply in every case of entry of satisfaction.

I am aware that the next Section of the Code providing a penalty in case satisfaction is not entered, makes Section 9023 a penal statute, which must be strictly construed; but, in my opinion, a little sense should be used even in making a strict construction.

Certainly an attorney in fact could occupy no higher ground than his principal and there could be no reason given for requiring the act of the principal to be witnessed and not requiring the same of the attorney in

fact when acting for the principal. Such, in my opinion, is especially the case where the language of the statute does not reasonably admit of any other construction.

I do not find that this particular proposition has been passed upon by the courts. The case of *Lewis v. Cannon*, 216 Ala., 515, was a suit where the mortgagor requested, in writing, the mortgagee to enter the fact of payment or satisfaction upon the margin of the record. The mortgagee entered the fact, but failed to have the judge of probate, or his clerk, witness the entry. The mortgagor sued for the penalty provided by Section 9024 of the Code. In that case, the Supreme Court, speaking through Justice Sayre, said:

"The statute (Section 9023) provides for an entry of payment or satisfaction on the margin of the record of the mortgage, and that 'such entry must be witnessed by the judge of probate, or his clerk, who, in his official capacity, must attest said satisfaction, and provides, further, for the entry of satisfaction by an attorney in fact; but the last stated provision is not drawn in question in this case. The requirement of attestation by the judge of probate, or his clerk, was designed, of course, to prevent unauthorized or fraudulent cancellation, and because, without such attestation, subsequent purchasers and incumbrancers are not affected by the notice of payment or satisfaction the statute intends to provide to the end that the owner, after he has paid or satisfied his debt, may be free to deal with his property as unincumbered.'"

The foregoing reasons for the witnessing by the probate judge or his clerk are, in my opinion, just as applicable where the entry is made by an attorney in fact as where made by the mortgagee himself.

For making such attestation, whether by himself or his clerk, the judge of probate is entitled to a fee of twenty-five cents.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

March 29, 1930.

Board of Revenue Jefferson County,
Birmingham, Ala.

No filing tax due for filing for record written assignment of mortgage.

Opinion by Assistant Attorney General Evans.

Gentlemen:

This acknowledges receipt of your letter of March 28, 1930.

You make the following statement of facts:

Subsequent to the First day of October, 1923, a mortgage on real estate made to the Keystone Mortgage Company was filed for record

in the probate office of Jefferson County, Alabama, and the privilege filing tax as provided by Section 4½ of an Act No. 172, approved August 22, 1923, (Acts 1923, p. 156) was paid. Subsequently, this mortgage was assigned to another person by written assignment. This written assignment was presented to Judge of Probate for record and a filing tax was paid thereon as for a deed, bill of sale or other instrument of like character as provided for by Act No. 301, approved Sept. 14, 1923 (Acts 1923, p. 318). Such other person has applied to the judge of probate as provided by Sections 375 and 376 of Revenue Act, 1919 (Acts 1919, p. 445) and has received the certificate of the Judge of Probate as provided by said Section 376.

Under the foregoing facts you wish my opinion as to whether or not you should pay the amount shown due by the county by such certificate.

In reply will say that, in my opinion, it was error on the part of the Judge of Probate to collect said filing fee and, under the facts stated, such money should be refunded as provided by said Sections 375 and 376.—*Garrison v. Hamlin*, 109 So. 106; *Jefferson County v. Smith* in Manuscript.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 10, 1930.

The Director,
State Child Welfare Department,
Montgomery, Alabama.

State Child Welfare Department—Authority to regulate and control maternity homes or hospitals, and to prosecute persons who operate such institutions without complying with the State laws.

Opinion by Assistant Attorney General Koonce.

Dear Madam:

I have your letter of March 12, 1930, with enclosures. You state that a maternity home or hospital is being operated in Jefferson County, and that the person or persons operating such home or hospital have not complied with the State laws pertaining to such institutions. You state that infants are placed in said home or hospital for care, and that persons desiring to adopt them are allowed to do so upon the payment of a specified sum, such sum to be determined by the person or persons who operate the home.

You request my opinion:

Are the person or persons who operate the home or hospital referred to above, subject to prosecution for failing to comply with the State laws?

In my opinion such person or persons are subject to prosecution for failing to comply with the State laws.

Section 1 of an Act approved October 1, 1923 (General Acts of 1923, p. 723) contains the provision that it should be the duty of the State Child Welfare Department to pass annually on the fitness of every agency, public, semi-public or private, which engages in the business for gain or otherwise, of receiving or caring for children or placing, or boarding them in private homes.

Section 10 of the above Act of Oct. 1, 1923, (General Acts 1923, p. 726) contains the provision that every person, acting for himself or for an agency, and every officer, agent or employee of the State Child Welfare Department, who violates any of the provisions of the Act, or who shall make any false statements to the State Child Welfare Department shall, upon conviction thereof, be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment, at the discretion of the Court.

Section 119 of the Code of Alabama of 1923, provides for the issuance of license by the State Child Welfare Department to those agencies which are competent, and have adequate facilities to care for children, and such section contains the further provision that no agency which does not hold such license shall receive a child for care or placing out, or place a child in another home or solicit money in behalf of such agency.

Section 133 of the Code of Alabama 1923, defines maternity hospitals.

After careful consideration of the above sections of the Code of Alabama, 1923, and of the above cited Acts of the Legislature, it is my opinion that any person or persons who operate a maternity home or hospital, and who fail to comply with the State laws pertaining to such institutions, are subject to prosecution as outlined in Section 10 of the Act approved Oct. 1, 1923, (General Acts of 1923, p. 726).

I am herewith enclosing all correspondence pertaining to the above matter.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 11, 1930.

Deputy Probate Judge,
Bessemer Division,
Bessemer, Jefferson County, Ala.

Where motor vehicle is operated by a "motor carrier", as defined by Section 2, and limited by Section 10, of Act No. 336, (Acts 1927, page 309) there must be attached to such motor vehicle such tag as shall be prescribed by the State Tax Commission.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of former date with reference to proper tag in the case stated is acknowledged.

You make the following statement of facts:

A bus operates between two cities or towns more than ten miles apart. The population of the two towns or cities come within the class prescribed by sub-division C of Section 14 of Act No. 290 (Acts 1923, pages 286-287).

You ask my opinion as to whether such bus should carry a jitney bus tag or a taxicab tag.

In reply will say that the information given is not sufficient to predicate a definite opinion upon. I judge, however, from what you state that the operator of such bus is what is termed in Section 2 of Act No. 336 (Acts 1927, page 309) a "motor carrier". Sub-division (c) of said Section reads as follows:

"Unless otherwise specified, the term 'motor carrier', when used in this act shall mean and include every person that now or may hereafter own, lease, control or operate any motor vehicle, with or without trailer attached, upon any public highway of this state as a common carrier for the transportation of passengers or property for hire, between fixed termini, or over a regular route, even though there may be periodic or irregular departure from said termini or route."

By Section 10 of said Act it is provided:

"Neither this Act nor any provision hereof shall apply or be construed to apply to any of the following: (a) motor vehicles used exclusively to convey passengers to and from schools, churches, or religious services of any kind, or to or from picnics, or upon special prearranged excursions: (b) to United States Mail Carriers operating star routes; when not subject to Section 13 of this Act: (c) to motor vehicles used in transporting livestock or any farm or dairy products from the place of production to market; (d) to any motor vehicle used in collecting dairy products from the producer; except nothing in subdivision (c) and (d) shall be construed to prevent a return load of farm supplies to be hauled, provided no charge is made therefor (e) taxicabs, hotel busses; (f) busses or trucks of transfer companies operating wholly within an incorporated city or town of the state, and not following fixed routes nor operating between fixed termini."

Section 12 of said Act provides:

"Every motor carrier shall keep attached to each motor vehicle operated under the provisions of this act, such distinctive markings or tag as shall be prescribed by the Tax Commission, and shall maintain such motor vehicle in good operating condition."

You will see from the foregoing that if the bus in question is operated by "motor carrier" as defined by said Act No. 336, such "motor carrier" must keep attached to such bus such tag as shall be prescribed by the State Tax Commission.

I, therefore, suggest that you take the matter up with the State Tax Commission, state to them the facts fully, and have them advise you what tag they have prescribed for such a case.

If the operator of said bus is not a "motor carrier" as defined by said Act No. 336, then, in my opinion, a taxi license tag should be used as provided in the last sentence of Section 14(a) of Act No. 290 (Acts 1923, page 287).

It will be noted that said 1927 Act modifies said Acts of 1923, wherever the two are in direct conflict.

I have been able to find no opinion from this office, nor decision of the Supreme Court or Court of Appeals upon the point inquired about; hence, I can make no citations other than the statutes cited.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 11, 1930.

The Probate Judge,
Tuscaloosa, Tuscaloosa County, Ala.

Where a gasoline filling station is operated for profit within five miles of each of two municipal corporations, but not within the corporate limits of either, the corporation having the smaller population controls the amount of privilege tax.—State v. H. G. Fain Service Station, 124 So. 119-121.

Opinion by Assistant Attorney General Evans:

Dear Sir:

Receipt of your letter of March 29th is acknowledged. You make the following statement of facts:

A person operates, for profit, a gasoline filling station within a mile of the corporation limits of the City of Northport, Alabama. This filling station is also within a very short distance of the City of Tuscaloosa. The population of the City of Northport, according to the last Federal Census, is more than one thousand and less than five thousand, while the population of the City of Tuscaloosa is twelve thousand and less than forty thousand.

You wish my opinion as to whether, under the facts stated, the license to be charged such operator should be based upon the population of the City of Northport or that of the City of Tuscaloosa, it being outside of, but within five miles of, the corporate limits of each of said cities.

In reply will say that when the Supreme Court of the State has given its interpretation of a statute, the statute itself is no longer to be considered, but the interpretation only given in the decision and opinion.

Section 20 of Act No. 163, approved July 22, 1927, was interpreted by the Court of Appeals of Alabama, and, on application for writ of certiorari to the Supreme Court of Alabama was concurred in by the Supreme Court, in the case of State of Alabama v. H. G. Fain Service Station, 124 So. 119, and 121.

Such being the case it is now necessary to attempt to interpret the interpretation. We have here a filling station which is so located with reference to each of two cities as to fall in either classification—which of the two classifications must govern, as viewed in the light of the decision of State v. Fain? It is my opinion that, in accordance with said decision and opinion the classification of the smaller city will prevail in all such places lying outside the corporate limits of the larger city.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 16, 1930.

The Superintendent of Banks,
CAPITOL.

Franchise tax and permit fee due where banking corporation, organized under the laws of Alabama, is in operation on and subsequent to January 1st of any year and should be paid by Banking Department when bank is subsequently, in such calendar year, taken over for liquidation.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of April 12, 1930.
You make the following statement of facts:

A bank organized and operating in the State of Alabama, under the laws of Alabama, on and for some time after the first day of January, 1930, was taken over by the Banking Department of the State of Alabama for liquidation as provided by law. It had failed to pay franchise tax as provided in Section 53 of Act No. 163, approved July 22, 1927 (Acts, 1927, page 176), or the permit fee as required by Section 43 of said Act.

You wish my opinion as to whether or not you, as State Liquidating Agent, should pay the franchise tax or the permit fee for the calendar year, 1930, such bank being insolvent.

In reply will say that, in my opinion, you should pay such tax. Such franchise tax runs according to the calendar year, and if the bank was operating on and after the first day of January, 1930, the liability accrued though not due for payment until April 1st.—Section 61 of said Act. Where a bank has operated the first part of the calendar year, there is no provision in the statute for remission of any part of the franchise tax for such calendar year upon any contingency.

The same is true with reference to permit fees required to be paid by Section 43 of said Act, except that the permit fee becomes due and payable on or before the first day of February.

By Section 74 of said Act, the "State and counties have a lien superior to all other liens upon all goods, wares, and merchandise or **any other property** owned by any person, firm or corporation liable for the payment of license **franchise or other taxes** due the State or county, and all costs, which said lien may be enforced by attachment in one and the same suit and in the name of the State."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 23, 1930.

Hon. Henry S. Long, Secretary,
Alabama State Bridge Corporation,
CAPITOL.

Toll for use of bridge in crossing a stream is not a tax on the privilege of crossing the stream, but is merely a reasonable compensation allowed by law for the use of the bridge in crossing the stream.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Yours of recent date, with copy of letter of April 19th, 1930, from D. H. Hauseman, 1st. Lt. Ord. Dept., U. S. A., Executive Assistant, is acknowledged.

In reply will say that the charge of a toll for crossing over the toll bridge in question is, in no sense, a tax. It is merely a reasonable compensation for the use of the bridge in crossing the river. The Alabama Bridge Corporation built, paid for and owns the bridge, subject to State and Federal regulations prescribed by statutes of the State and Acts of the Congress of the United States.

Under the State law it is given the right to charge to every person using the bridge for crossing the river a reasonable toll or compensation for such use of the bridge.

Where the bridge spans a navigable stream in Alabama, permission to build and operate such toll bridge must be obtained also from the United States Government. In the case under consideration consent was given for United States by Act of Congress—Public—No. 526—70th Congress (H. B. 13481). This Act of Congress provides as follows:

Section 2. "If tolls are charged for the use of such bridges, the rates of toll shall be so adjusted as to provide a fund sufficient to pay the reasonable cost of maintaining, repairing, and operating the bridges under

economical management, and to provide a sinking fund sufficient to amortize the costs of the bridges, including reasonable interest on bonds issued to provide funds for constructing the same, as soon as possible, under reasonable charges, but within a period of not to exceed eighteen years from the date of approval of this Act. After a sinking fund sufficient for such amortization shall have been so provided, and in any event after such period of eighteen years, all of said bridges shall thereafter be maintained and operated free of tolls. All tolls collected for the use of said bridges shall be kept in a separate fund by the proper authorities of the State of Alabama, according to the law of said State, and no part of said funds shall be used for any purpose except for paying for the reasonable cost of maintaining, repairing, and operating the bridges and amortizing the costs of constructing the same, including interest, as provided in this Act. The tolls charged by the Alabama State Bridge Corporation, its successors or assigns, shall be uniform as between persons, and as between vehicles of the same type, using each of such bridges, and the corporation shall not authorize or permit any discrimination between persons or between vehicles of the same type transiting any particular bridge constructed under the provisions of this Act: Provided, That nothing herein shall be construed to prevent different tolls being charged at different bridges, but in fixing the rate of tolls there shall be no discrimination as between persons and none as between vehicles of the same type. An accurate record of the cost of the bridges, the amount of notes or bonds issued for the construction of the same, and the expenditures for maintaining, repairing and operating the same, the daily tolls collected, and the sinking fund on hand shall be kept and shall be available for the information of all persons interested."

It will be seen from the foregoing that the Congress recognizes that the toll is charged for the use of the bridge in crossing the river, and that it is not to be considered as a tax on the privilege of crossing the river. The Act of Congress provides no exceptions for the charge of the toll; but, on the other hand, provides that all persons, under given conditions, shall be treated alike.

No privilege for the use of the United States is reserved. While a state may not tax the United States, I know of no law by which it is provided that the United States may use the property of another without paying a reasonable compensation therefor when charged.

The error, on the part of Lt. Hauseman, arose out of considering the toll a tax, which, in contemplation of law, it is not.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

April 29, 1930.

The State Auditor,
CAPITOL.

1. The lien given tax collectors under the provisions of Section 412 of the Revenue Act, 1919, may be enforced in favor of such tax collector in the same manner that liens for taxes in favor of state and county may be enforced; but the proceeding must show that it is for the enforcement of the tax collector's lien acquired under the facts and circumstances named in said Section 412.

2. Neither the State nor County has any interest in such a proceeding, and neither the Judge of Probate nor the State Auditor has any duty to perform with reference to such foreclosure.

3. The State having no interest in such foreclosure, and there being no provision of law therefor, the State Auditor is without authority to draw his warrant in favor of any newspaper for publishing anything with reference to such foreclosure proceedings.

4. Section 261 of the Revenue Act, 1919, (Acts 1919, p. 358) has no application to such a sale, and, in my opinion, the tax collector may protect his interest by becoming the purchaser at said sale.

5. I find no provision of law for redemption of real estate sold under decree of probate court on such foreclosure.

6. The foreclosure proceedings by the tax collector must begin within twelve months from the date of such payment of taxes by him.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of date December 17, 1929. You make the following statement of facts:

Taxes were duly assessed against "A," a tax payer. Certain real estate was included in said assessment. Tax Collector failed to collect such taxes, and, on settlement with the County and State, was charged with and paid said assessment.

You wish my opinion under the facts stated, upon the following:

1. Could the Tax Collector, after thus settling with State and County for the taxes so assessed, sell said real estate under decree of the Probate Court?

2. If so, and no person should bid for the real estate so offered for sale in amount sufficient to pay the sum specified in the decree of sale, would the judge of probate be authorized to bid in such real estate for the State, under the provisions of Section 255 of the Revenue Act 1919? (Acts 1919, p. 357).

3. Should the State Auditor receive and place on his record the certificate of the sale of land so bid in?

4. Should the State Auditor allow credit to the Tax Collector for the land so bid in, when a subsequent settlement is had with the Tax Collector?

5. Should the State Auditor draw his warrant in favor of the newspaper that advertised this sale?

6. If the land is redeemed to whom does the amount of the State taxes belong?

In reply to your several questions will say that in my opinion after the Tax Collector has failed to collect on a tax assessment, which he could and should have collected, and, in settlement with County and State, same is charged to him, and he pays to each the amount due on such assessment, neither the State nor County has any further interest in the matter of such assessment. The assessment has thus become *functus officio*.

Where a Tax Collector has paid a tax under the circumstances named, the liens of the State and County no longer exist. The State and County are no longer interested.

By Section 412 of the Revenue Act, 1919, (Acts 1919, p. 448) the Tax Collector is given certain rights in the premises.

It will be seen from reading said Section, that when a Tax Collector fails to collect any taxes and the same are charged against him on settlement with State or County, the Collector then has a lien upon the real and personal property of the person, firm or corporation against whom such taxes were assessed, if same were properly assessed against such person, firm or corporation, for repayment to him of such money, which lien may be enforced in favor of such Tax Collector in same manner that liens for taxes in favor of the State and County may be enforced, at any time within twelve months after same are charged against such Tax Collector.

In construing said Section 412, it must, in my opinion, be kept in mind that after the Tax Collector has settled with State and County for such tax, the State and County have no further interest in the matter. The Tax Collector is given a lien upon the real and personal property of such tax payer for repayment to him of such money—that is, the money used by him in paying such taxes. To enforce this lien, the Tax Collector may proceed in the same way that is provided by law for the enforcement of a lien for taxes. However, such proceeding must show that it is for the purpose of enforcing the Tax Collector's lien for reimbursement for money paid out by him to State and County for taxes assessed against such tax payer.

In foreclosing this lien there is no authority of law for the Judge of Probate to buy the property, offered for sale, for the State. That can be done only in cases where property is being sold, under decree of the Probate Court, for taxes due State and County.

It is also my opinion that when property is offered for sale to satisfy the lien given the Tax Collector to secure to him repayment of money so paid by him, Section 261 of the Revenue Act, 1919 (Acts 1919, p. 358) has no application. That Section, prohibiting Tax Collectors, Assessors and Judges of Probate from becoming purchasers, applies only where real estate is being sold for taxes. The Tax Collector may, in my opinion, become the purchaser

at such sale to protect his interest. After the tax was paid by the Tax Collector, the State had no further interest in the matter. The taxes, then, were paid. The lien of the State and County upon the property of the tax payer for payment of the taxes ceased to exist. Any proceeding in the probate court purporting to be for the enforcement of the lien for taxes would be necessarily void; a decree made for sale of real estate to pay taxes which had already been paid to State and County by the Tax Collector, would be void.

After such payment by the Tax Collector, the Tax Collector is given a lien by said Section 412; and, by the provisions of said Section, the **Tax Collector's lien** may be enforced in the same manner that the liens for taxes in favor of the State and County may be enforced.

I am of opinion that the proceedings by the Tax Collector to enforce the lien given him must show what lien he is proceeding to enforce and the facts which gave him the lien.

The lien given the Tax Collector may be enforced by the Tax Collector by a proceeding in the Probate Court, in the same manner as is provided for enforcing the lien for State and County taxes; or, it may be enforced by a proceeding in equity; as both these proceedings are open to enforcement of lien for State and County taxes.—Revenue Act, 1919, Section 416, (Acts 1919, p. 449). But, in either case, it must be enforced as the lien given the Tax Collector and not as the lien of the State and County for taxes.

I find no provision of law for redemption of real estate sold under decree of the Probate Court to satisfy the lien of the Tax Collector.

The State Auditor has no duty to perform in connection with such a sale.

It will be noted that the lien given the Tax Collector is upon the real and personal property of the person, firm or corporation against whom such taxes were assessed. It is not confined to the property assessed. This lien is given as of date of payment of taxes by the Tax Collector and must be enforced, if at all, at some time within twelve months after such taxes have been charged to the Tax Collector.

The lien upon property of the tax payer, other than on the real estate assessed, whether to State and County for payment of taxes, or to Tax Collector to reimburse him for money paid out for taxes not collected by him, but charged to him on settlement, can, in no case, be foreclosed in the Probate Court. It must be foreclosed in a Court of Equity.

Since the State and County have no interest in the foreclosure of such a lien and since the statute does not so provide, the State Auditor is without authority of law to draw his warrant in favor of any newspaper for advertising anything with reference to such foreclosure.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 5, 1930.

Superintendent of Education,
Montgomery, Alabama.

City treasurer—Bank not authorized to act as city treasurer and custodian of city school funds.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 23, 1930. In it you refer to Sections 196 and 197 of the School Code of 1927.

You request my opinion:

1. Can the municipal authorities of an incorporated town, whose schools are under the control of a city board of education, designate a bank as city treasurer?

2. If the municipal authorities of an incorporated town, whose schools are under the control of a city board of education, can designate a bank as city treasurer, will it be necessary for such bank to file a bond as outlined in Section 197 of the School Code of 1927?

In my opinion the municipal authorities of an incorporated town, whose schools are under the control of a city board of education, cannot designate a bank as city treasurer.

Section 196 of the School Code of 1927, contains the provision that the city treasurer shall be custodian of the school funds of the city, and that he shall receive and hold all monies to which the board of education is entitled by law, etc.

Section 197 of the School Code of 1927, contains the provision that before assuming any of the duties of the office the city treasurer must give bond in an amount to be fixed by the State Superintendent of Education in a reputable surety company authorized to do business in Alabama conditioned upon the faithful performance of the duties of his office, and upon the accounting and paying over to the proper authority of all monies coming into his hands.

After careful consideration of the above Sections 196 and 197, it is my opinion that the legislative intent, when said sections were enacted, was to require an individual to be city treasurer and custodian of the city school funds, and in my opinion, said sections do not authorize a bank to act in such capacity.

I rendered you an opinion on February 4, 1930, in which I held that a city treasurer should be required to furnish one bond for the faithful performance of his duties as city treasurer, and to furnish another bond for the faithful performance of his duties and the accounting for all monies coming into his hands as custodian of city school funds.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1930.

The Tax Assessor,
Decatur, Morgan County, Alabama.

Taxation—Municipal corporations not entitled to ten per cent penalty imposed upon delinquents who fail to assess property before the first Monday in February.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

Some time ago you wrote me and referred to Section 3095 of the Code of 1923, and you stated that the Cities of Falkville and Hartselle had authorized the collection of their city taxes by the State and County Tax Collector.

You request my opinion:

If cities or towns authorize the collection of their taxes in the manner provided by the above Section 3095, are such cities or towns entitled to the ten per cent penalty which is imposed for failure to assess property before the first Monday in February?

In my opinion the cities and towns referred to above, are not entitled to the ten per cent penalty for failure to assess property before the first Monday in February.

Section 3095 of the Code of 1923, contains the provision that any municipal corporation may provide for the assessment, equalization and collection of taxes due such municipal corporation, by the tax assessor and tax collector of the county.

An Act approved August 22, 1923, (General Acts 1923, p. 175, Section 37) provides that a penalty of ten per cent of the taxes to be assessed, shall be imposed upon delinquents who fail to furnish the tax assessor with a list of their taxable property before the first Monday in February.

I have considered the above section of the Code, and the Act referred to above, and in my opinion, it was not the legislative intent to allow municipalities the ten per cent penalty which is imposed upon delinquents who fail to assesses their property for taxation before the first Monday in February.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1930.

The Superintendent of Education,
Tuscaloosa, Tuscaloosa County, Alabama.

Schools—County Board of Education cannot pay commission to real estate agent for selling school property.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of November 26, 1929. You state that after several attempts to sell negro school property with a real estate agent, and that he sold it, and is now requesting payment of his commission. You request my opinion:

Has the county board of education the right to pay the usual five per cent commission to a real estate agent for selling State owned school property?

I am unable to find any law that could give the school board of your county the authority to pay commission to a real estate agent for sale of school property or lands. It is true that under Section 95, School Code of Alabama, 1927, all school property is vested in the county board of education and the provision of this statute is very broad but it was never the intention of the framers of this section that it should be construed to include a provision that could justify the payment of commission of this character. This Section is as follows:

"95. Property Vested in County Board.—All the property, estate, effects, money and funds, claims, and donations, now or hereafter vested by law in the public school authorities of any County for the benefit of the public schools of any County, hereby transferred and vested in the County Board of Education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district, or public school, shall be held in trust by the County Board of Education for the benefit of any such county school district or school."

The school board of each county is like the commissioners court. It is purely of statutory origin. It has no inherent or constitutional power and before it can do any act or perform any service it must be able to point to some direct statute or law authorizing its action.

State v. Street, et al. 117 Ala. 203,
Edwards v. Williamson, 70 Ala. 145.

Therefore, it is my opinion that such a commission when paid by the School Code of any county is illegal and without authority of law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1930.

The State Tax Commission,
CAPITOL.

Gasoline pumps or fillers—Privilege tax based upon number of outlets or places where gasoline is dispensed.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of January 23, 1930. In it you refer to your letters of November 13, and 20, 1929, and you enclose copies of these letters. In your letter of November 13, 1929, you refer to Section 20 of the Revenue Act of 1927, wherein a license on filling stations is provided, such license being based on the number of pumps or fillers. You state that according to the best information you have been able to obtain, the license on filling stations throughout the country was originally based on the number of pumps, and that the word "filler" was not used. You further state that gasoline dealers quickly took advantage of this language and undertook to evade the license by the method of constructing a filling station with but one pump, but which had several outlets for the dispensing of gasoline. You state that this provision enabled a gasoline dealer to dispense gasoline from one pump to several cars at the same time.

You request my opinion:

Is the license which is provided in the above Section 20 of the Revenue Act of 1927, based upon the number of pumps which a filling station operates, or is it based upon the number of outlets or places where gasoline is dispensed?

In my opinion such license is based upon the number of outlets or places where gasoline is dispensed.

Section 20, of an Act approved July 22, 1927 (General Acts 1927, p. 161) provides the schedule of privilege tax to be collected from each person, firm or corporation operating for profit a gasoline station or pump in cities or towns or within five miles thereof. Said Section contains the provision that in cities of one hundred thousand inhabitants and over, where only one pump or filler is used the license shall be \$50.00, and for each additional pump \$50.00, and in cities of forty thousand inhabitants and less than one hundred thousand where only one pump or filler is used, \$40.00, and for each additional pump, \$40.00, etc. After careful consideration of said Section 20, it is my opinion that it provides for the collection of privilege tax upon each outlet or place for the dispensing of gasoline. If the Legislature had intended otherwise when it enacted the provisions of Section 20, I can see no reason for the use of the word "filler," because the use of the word "pump" would have been sufficient to convey the meaning that the privilege tax was to be collected only for the operation of pumps.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1930.

The Judge of Probate,
Tuscumbia, Colbert County, Ala.

Court of County Commissioners: No authority to pay expenses for Post Office box rent for county officers.

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of January 22, 1930.

You request my opinion:

Whether or not the county is authorized to pay rent on Post Office boxes for the tax assessor, tax collector, circuit clerk, sheriff, superintendent of education, county health officer and judge of probate?

I am of the opinion that your question should be answered in the negative. I am unable to find any statute or the construction of any statute that would give the Court of County Commissioners or Board of Revenue the authority to pay Post Office box rent for the officers mentioned in your letter or any other officers.

Public funds cannot be expended unless there is express or necessarily implied authority for the expenditure. This was held to be the law in the following cases:

Bice, County Treasurer v. Foshee, 97 So. 764,
Ensley Motor Car Co. v. O'Rear, 71 So. 704.
Attorney General's Report, 1926-1928, p. 217,
Opinion of Attorney General, Book 16, p. 25, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 6, 1930.

The State Tax Commission,
CAPITOL.

Taxation—No refund of money erroneously paid to Tax Commission under Sections 44-52 of House Bill 359, approved July 22, 1927, (General Acts 1927, p. 359) can be made.

Opinion by Assistant Attorney General Smith.

Dear Sirs:

I have your letter of November 19, 1929, in which you state that an agent of the owner of certain securities filed a list of such securities with the State Tax Commission and made a payment of \$25.50 which covered tax.

record and filing fees on such list. It was later found that the owner for whom the agent had filed the list had sold the securities prior to October 1st and did not own or want them listed for taxation.

You request my opinion:

Whether or not a refund could be made in the case of erroneous payment of the tax provided for in Sections 44-52 of House Bill 359, approved July 22, 1927.

I am of the opinion that the money in question has been paid into the State Treasury, and since there is no law for paying it back, the Legislature only can make the refund.

Attorney General's Report 1926-1928, p. 399.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 7, 1930.

The Judge of Probate,
Rockford, Coosa County, Ala.

Elections—The names of candidates for party offices to be filled by the vote of a single county, need only be certified to by the Chairman of the County Executive Committee of a party.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 2, 1930, in which you request my opinion as follows:

Should you certify the name of a candidate for the Legislature from your county for publication on the ballot in the approaching Democratic Primary, the candidate having properly qualified with the Chairman of the Democratic Executive Committee of the county, but who was refused for qualification by the State Chairman of the Democratic Executive Committee?

I am of the opinion that you should so certify the name of said candidate, if he has properly qualified with the Chairman of the Democratic Executive Committee of the county.

Section 610, Code of Alabama, 1923, provides as follows:

"610. Names of candidates certified to secretary of state and judge of probate.—The chairman of each state executive committee of the parties entering such primary shall, at least twenty days prior to holding of such primary election, certify to the secretary of the state of Alabama the names of all candidates of his party running for office, who

are voted for by the voters of more than one county, and the chairman of each county executive committee of the parties entering such primary election shall, at least fifteen days prior to the holding of such primary election, certify to the probate judge of the county the names of all candidates of his party for office to be filled by the vote of a single county, and the secretary of state shall, within not less than fifteen days prior to the time of holding such primary election, certify to the probate judge of any county where an election is to be held for any particular office the names of the candidate or candidates certified to him, and also of those who have qualified before him, for such offices, and the probate judge of each county in Alabama shall in the manner and form herein-after set forth prepare all ballots voted in such election."

The office of a representative to the State Legislature from a county is one to be filled by the vote of a single county. Therefore, in compliance with the above quoted Code section, it is only necessary so far as representatives to the legislature are concerned, that the chairman of the county executive committee of the political party concerned, at least fifteen days prior to the holding of the primary election, certify to the probate judge of the county the names of candidates of his party for representative in the legislature to be voted on in such election.

While the representative of a county in the legislature is, in a sense, a state officer, nevertheless, the office is filled by the vote of a single county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 7, 1930.

The Highway Director,
State Highway Commission,
CAPITOL.

Highways—County not entitled to refund for amounts appropriated to match Federal Aid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

1. If a County raised a sufficient amount of money to match Federal Aid for the construction of a road in the State system of highways which road is to be constructed under the supervision of the State Highway Department, and the money paid into the State Treasury by the County, could the county be reimbursed for all money so appropriated by it in the event the State secured additional funds for road construction?

2. Should such an arrangement be made and the present Highway Commission pass an order agreeing to make this refund and should money raised by bond issue or otherwise in another administration, would the order of the present Commission be binding?

I am of the opinion that both of your questions should be answered in the negative.

Section 10 of an Act approved November 1, 1921 (Acts 1921, p. 54) which provided for a refund to counties of amounts appropriated to match Federal Aid, is no longer in effect. Said Section was not reenacted in the Highway Act of 1923 nor incorporated in the Code of Alabama of 1923, nor reenacted in the Highway Act of 1927. Such omissions, together with the repealing clauses of the subsequent Acts and the Act adopting the Code of 1923, clearly shows, in my opinion, a legislative intent to repeal said Section. Said Section allowed those counties which were in good financial condition to secure the benefit of Federal Aid, while depriving the less fortunate counties of said benefit. This, in my opinion, accounts for the reason of said repeal.

Section 10 of an Act approved November 1, 1921, (Acts 1921, p. 54) supra, is no longer law. A refund could not be made to a county, which appropriated money to match Federal Aid, under this Section. I am unable to find any other authority of law which authorizes such a refund.

Section 23 of the Act approved Aug. 23, 1927, (General Acts 1927, p. 353) known as the Highway Code of 1927, provides that the State Highway Department may accept appropriations from a county for work done in that county, which should be paid into the State Treasury to the credit of the State Highway fund. But there is no provision providing for a refund to said county for the money so appropriated.

Relative to your second inquiry, I find no authority of law authorizing the Highway Commission to pass an order agreeing to refund money so appropriated by a county. In so doing, said commission would be speculating upon future legislative actions. In other words, said Commission would be agreeing with the county that a future legislature would enact a retroactive law authorizing such a refund. Such an agreement would be void and not binding on the present Commission—much less, upon another administration.

I know of no way by which the above plan could be consummated. The State Highway Commission and the State Highway Department are without authority of law to borrow money or to contract to pay interest.

Opinions of Attorney General, Biennial Report 1922-1924, pp. 374 and 431.

The opinions of the Attorney General, Biennial Report 1920-1922, pp. 445 and 470, being decided under an Act, which is no longer in effect, has no application to the instant case.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

Tax Collector,
Prattville, Autauga County, Alabama.

State and County taxes when not fully paid on account of error,
how collected.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of October 28, 1929. In it you state that during the year 1927 you made an error in addition of \$100.00 in a certain tax, and that this error was not discovered until some time after. The party in whose favor it was made has refused to pay the balance due.

You request my opinion:

How am I to collect this tax?

You had a right under the law as soon as you discovered this error and the party refused to pay the balance to have proceeded to collect the same as you proceed to collect payment on all taxes. However, if the statute of limitation of three years has not run against this balance due you, you have an individual suit against the party refusing to pay same for this amount as I presume you have already had to pay the balance which you failed to collect to the State and County.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The State Tax Commission,
CAPITOL.

Attention Mr. Mooring.

Licenses—Auto—A license tag procured for automobile cannot be transferred to another person or to another car of the same person after the expiration of fiscal year for which the tag was purchased.

Opinion by Assistant Attorney General Haynes.

Gentlemen:

I have your letter of January 31, 1930, in which you state:

A person purchasing a license and a tag for his car for the fiscal year 1929, and in January 1929 he purchases a new car of the same horse power as his old one and places the tag from his old car on the new one, but fails to have the same transferred as provided by law. After the fiscal year of 1929 expires he is cited by the license inspector for operating car without proper license for the year 1929. He now offers to have the transfer made.

You request my opinion:

Can a transfer be made of a license procured for an automobile to another car of the purchaser of the same horse power or to another person, after the fiscal year has expired for which the license was paid and the tag procured?

From the facts stated above it is my opinion the transfer cannot be made after the license year for which the tag was purchased has expired.

It is true that Schedule 13 of Section 12 of the Revenue Laws of Alabama, 1929, provides for the transfer of tags and is in the following language:

"* * * Persons paying an automobile license may have the same transferred to any other person or to any other car, provided the same is not of a greater horse power by applying to the probate judge who issued the same, * * *."

I am cognizant of the fact that this office has held that there is no limit as to the time when this transfer may be made, but the expression "no limit" has its limitations and in sound reason I held this to include any time within the year for which such license was procured. To place any other construction on this language would be without reason for after the fiscal year for which the license was procured has expired there would be nothing to transfer as this license would have performed its mission and become so far as any protection to the transferee nothing more or less than a black piece of tin or paper, so far as its power to grant any right or privilege under the same. For instance, a license which carries a tag for 1929 expires October 1st, 1929, and after that date is in fact without value. It is true that the owner of such license tag is given a few days of grace to procure a license for 1930, but this period of grace does not change the date on which it expires, which was October 1st, 1929.

Therefore, any transfer of this license and tag after the date of expiration could and does not carry with it any property right or privilege and, therefore, is void.

To hold otherwise would open wide the door to all manner of fraud, as after the fiscal year has closed there are many thousand tags as such tags no longer have any value and usually are thrown away.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Circuit Solicitor,
Monroeville, Monroe County, Alabama.

Intoxicating liquors—condemnation of vehicles—procedure.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of February 27, 1930, requesting my opinion as to the procedure to be followed in condemnation of vehicles, etc. You ask the specific question:

“What procedure am I to follow in cases of an adverse decree where the State desires to appeal to the Supreme Court?”

In answer to your question, I am of the opinion that you, as solicitor, must give written notice to the Register of the Circuit Court in Equity, stating that the State of Alabama desires to appeal from the decree of the Judge of the Circuit Court in Equity in said cause.

Code of Alabama, 1923, Section 2778.

General Acts of Alabama, 1927, p. 715.

Supreme Court Rules of Practice, 43.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Judge of Probate,
Greenville, Butler County, Alabama.

Elections—Poll tax cannot be paid in advance.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 14, 1930, in which you request my opinion as follows:

Would one, who has paid his poll tax twice in 1928 and failed to pay his poll tax in 1929, be entitled to vote in the coming election?

I am of the opinion that your question should be answered in the negative.

The payment of poll tax is due to be paid in the county of bona fide residence on October 1st.

Opinion of Attorney General, Book 16, p. 56, (office edition).

Section 178, Constitution of Alabama, provides that before a person shall be qualified to vote at an election by the people: “He shall have paid on or

before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year 1901, and for each subsequent year thereafter."

Poll tax is due as of October 1st, but must be paid by February 1st. Said poll tax cannot be paid until it becomes due. To hold otherwise would allow one to pay his poll tax for years in advance, change his residence, and still be entitled to vote in Alabama. Such is not the letter nor the spirit of law.

All of the qualifications of legal voter in the State of Alabama, as set out in Section 361 of the Code of Alabama, 1923, must first be fulfilled before one is entitled to vote.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Tax Collector,
Gadsden, Etowah County, Alabama.

Corporations—Capital stock—Assessment and construction of—Act approved July 22, 1927, (General Acts, 1927, p. 139).

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of May 1st regarding the enforcement of collection of taxes due by the Gadsden Loan and Investment Company, a corporation, for the tax year of 1929, in which you state that said corporation has heretofore paid its taxes but claimed an exemption for the year 1929. You request my opinion:

Is this corporation entitled to an exemption where they have failed to make a return for the year 1930?

I assume that you refer to the franchise tax and the assessment of shares of capital stock by the State Tax Commission and upon that assumption this opinion is based. I am of the opinion that the Gadsden Loan and Investment Company, a corporation, must pay the taxes as assessed by the State Tax Commission and that they would not be entitled to an exemption unless the same was claimed at the time of the return made by said corporation.

Section 73, General Acts of Alabama, 1927, p. 185.

By the above cited Act, the Gadsden Loan and Investment Company, a corporation, was required to make a return and the minutes of the State Tax Commission show that it made its return on January 24, 1929, and made no claim for exemption and that on March 8, 1929, notice by registered mail, as is required, was given said corporation to protest and no protest was ever filed by said corporation.

Section 73 of the above cited Act reads in part as follows:

"If the owner of any property which is by law required to be assessed by the State Tax Commission, is dissatisfied with the final assessment as fixed by the said Tax Commission, he or it may appeal from said final assessment made by the said Tax Commission to the Circuit Court of Montgomery County, sitting in equity, by filing notice of appeal with the Secretary of the State Tax Commission and with the Register of the Circuit Court in Montgomery County **within thirty days from the date of said final assessment made** and entered on the minutes of the commission as required by law. * * *"

It is obvious that the Legislature provided an exception as to banks or banking associations and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate, **and industrial loan companies or corporations.**

However, this company had thirty days in which to protest or appeal from the order of the State Tax Commission in assessing the capital stock of said corporation.

When the tax books are made out as provided by law, the abstract furnished the Tax Collector is authority for him to collect the taxes and he is chargeable therewith if he fails to collect and renders him liable if he fails to collect.

Fidelity and Deposit Co. v. Mobile Co., 124 Ala., 145.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Superintendent of Insurance,
CAPITOL.

Insurance—Associations providing burial or funeral benefits are Mutual Aid Associations.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 29, 1930, concerning the Funeral Benefit Association of Albany-Decatur, Alabama, together with the certificate of membership and a copy of the By-Laws of said Association. The plan of operation of said Association seems to be as follows:

Each member pays \$1.60 at the time he joins. The sixty cents defrays the expenses of the association. The dollar is held as a death fund and the total thereof is paid to the survivor of the insured and his beneficiary according to whichever dies first. At each death a new assess-

ment of \$1.00 per member is made and placed back in the death fund so that this fund is kept replenished in this way at all times.

You request my opinion as to whether or not the above plan of operation is a mutual aid insurance business as defined by Section 78 of the Insurance Laws, (Section 8396 of the Code of Alabama, 1923).

I am of the opinion that your question should be answered in the affirmative. Section 8396 of the Code of Alabama, 1923, provides in part as follows:

“8396. What are mutual aid, benefit, and industrial companies or associations; requirements.—All companies or associations, whether voluntary or incorporated under the laws of this State or any other State, doing in this State a business limited to the issuing of certificates or policies to or agreeing with their members or policy holders upon the birth or death of any child, upon marriage, death, sickness, or upon any physical disability of such member or policy holder, to pay money or render aid to him or to others dependent upon him or beneficiary designated by him, which money or aid is derived from donations or from fees, dues and assessments, are mutual aid, benefit, or industrial companies or associations. * * *”

The association referred to above, in my opinion, comes within the provisions of Section 8396, *supra*, which defines mutual aid associations, in that it is an association agreeing with its members or policy holders upon the death of such member or policy holder, to pay money or render aid to the beneficiary designated by him, which money or aid is derived from fees, dues and assessments.

Furthermore, Section 107 of the Insurance Laws (Section 1, Acts 1927, p. 215) provides that all companies or associations, whether voluntary or incorporated under the laws of this State or any State, and all individuals, firms and co-partnerships doing business of **providing burial or funeral benefits** are hereby declared to be mutual aid, benefit or industrial insurance companies or associations.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

Superintendent of Education,
Centreville, Bibb County, Alabama.

Adverse possession—Mere fact of adverse possession of land cannot confer title as against the State.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of February 8, 1930. In it you state that on January 21, 1907, a certain plot of land was deeded by H. V. Faucett and wife to the

Board of District School No. 41 in Bibb County. You also state that Jim Young owns land which adjoins the above land, and that he fenced a part of said land with his own land, and has cultivated it for about twenty years, during which time he has held peaceable possession. You state that the school board desires to erect buildings on the part of the plot which Mr. Young fenced, and which he now claims to own, basing his claim on peaceable possession for about twenty years. You state, however, that Mr. Young has no deed to the land in question.

You request my opinion:

Does the fact that Mr. Young held peaceable possession of the above land for approximately twenty years, give him title by adverse possession?

In my opinion the mere fact that Mr. Young has held adverse possession for approximately twenty years does not give him title by adverse possession.

Section 7475 of the Code of 1923, provides that actions for the recovery of lands of any public educational or governmental institution of Alabama, shall be brought in the name of the State.

Section 8939 of the Code of 1923, provides that there is no limitation of time within which the State may bring actions for the recovery of lands mentioned in the above Section 7475. The sections of the Code referred to above clearly show that a person cannot acquire title as against the State or County by the mere possession of land.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Register,
Circuit Court in Equity,
Grove Hill, Clarke County, Alabama.

County bonds—Elections called.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of April 12, 1930, in which you state that the officials of Clarke County are contemplating calling an election for the issuance of bonds.

You request my opinion:

Can an election be called without giving notice of same?

In answer to your question, I am of the opinion that the Court of County Commissioners or Boards of Revenue in their respective counties may order an election to be held to decide whether or not bonds shall be issued.

Section 250, Code of Alabama, 1923.

By Section 252, Code of Alabama, 1923, it is the duty of such Court of County Commissioners to give notice of such election for thirty days by publication in some newspaper published in the county in which the election is to be held which notice shall state the purpose for which such election is to be held and the time and place for holding same.

Section 254, Code of Alabama, 1923, provides the manner of appointing the election managers. That is to say, the Judge of Probate, Circuit Clerk, and Sheriff, of the counties in which such elections are to be held under Article 13 of the Code, must within ten days after the notice has been given by Section 252, *supra*, appoint three managers and one returning officer to conduct the election in each polling place in the county.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Judge of Probate,
Chatom, Washington County, Alabama.

County warrants—how refunded.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 6, 1930, in which you state that on March 8, 1928, the Commissioners Court of Washington County allowed a claim of William Cooper and nephews for \$5,291.25 for cattle dipping in your county; that you issued a county warrant bearing six per cent interest until paid to the above parties for this amount; that you are now desirous of paying \$2,000.00 on this warrant and having the balance extended.

You request my opinion:

Can we legally have them surrender this warrant on the payment of the \$2,000.00 and issue new warrant for the balance?

I presume that you got your authority for issuing the original warrant from Section 8782, Code of Alabama, 1923, which is as follows:

"The Court of County Commissioners, Boards of Revenue or other governing body of any county in this State, which county has outstanding indebtedness evidenced by valid warrants, may settle, adjust or refund said indebtedness by the issuance of warrants of said county in an amount not greater than the amount of the warrants to be settled thereby."

I also presume on issuing this warrant, you followed the provisions of Section 6783, Code of Alabama, 1923, which is as follows:

"Before the issuance of any warrants provided for in the preceding section, the court of county commissioners or other governing body in said county shall select the warrants it is proposed to settle, adjust, or refund, and shall make a minute entry of the amount and date when passed, the register number and the holder of same. It shall also make a minute entry in the minutes of the said court of the numbers, amounts and names of the persons to whom said new warrants shall be issued and the length of time the same shall run."

In issuing the new warrants for the balance due you should follow closely the provisions of Section 6783, *supra*, and let the minutes of the commissioners court show the whole transaction and when you do this, I am of the opinion you can make the substitution in the way you refer to above.

The above Sections set out are new Sections, appearing for the first time in the Code of 1923, and were placed in the Code by the Code Committee.

I am unable to find where any court of last resort has construed the same, but I think their provisions are plain.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Judge of Probate,
Montgomery, Montgomery County, Alabama.

Elections—A candidate for Beat Committeeman in a Primary Election must qualify with the Judge of Probate in compliance with Article 26 of Chapter 19 (Sections 582-600), Code of Alabama, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 14, 1930, in which you request the opinion of the Attorney General as to whether or not it is necessary for a candidate for Beat Committeeman in the forthcoming Democratic Primary to qualify as other candidates in the office of the Judge of Probate in compliance with Article 26 of Chapter 19 (Sections 582-600), Code of Alabama, 1923, entitled "Corrupt Practice Law."

I am of the opinion that your question should be answered in the affirmative.

Section 582, Code of Alabama, 1923, provides as follows:

"582. Political committee defined.—Any one or more persons who shall be elected, appointed, chosen or associated for the purpose wholly or in part of directing the raising, collection or disbursement, and every two or more persons who shall cooperate in the raising, collecting or dis-

tribution, or in controlling or directing the raising, collecting or disbursement of money used or to be used to further or defeat the nomination or election of any person, or any class or number of persons to **public office by popular vote**, or in support of or in opposition to any measure or proposition submitted to popular vote, shall be deemed a political committee within the meaning of this article."

Section 583, Code of Alabama, 1923, provides as follows:

"583. Candidate defined. The word candidate in this article means any person who has announced to the public that he is a **candidate for election or nomination to any public or party office.**"

Section 584, Code of Ala. 1923, provides as follows:

"584. Election defined. The word election in this article means any election in which there is submitted to the **popular vote the names of any persons for nomination or election to any office, or in which there is submitted to the popular or party vote any measure or proposition.**"

The election of Beat Committeeman comes within the purview of the above quoted section. Same is a party officer, to be elected by a popular vote of the people of a precinct, in a primary election.

Section 586, Code of Alabama, 1923, is entitled: "Amount of campaign expenditures graduated and fixed." Part of said Section provides as follows:

" * * * by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, or at the last preceding state primary, if more votes were cast in such primary than in such election, shall be five thousand or less, the sum of one thousand dollars."

Another part of said Section provides as follows:

" * * * by a candidate for any other party office the sum of two hundred and fifty dollars."

Construing the foregoing sections together with the other sections of the Corrupt Practice Law (Article 26 of Chapter 19, Code of Alabama, 1923—Section 582-600), I am of the opinion that a candidate for Beat Committeeman in a primary election is such a candidate as to come within its provisions; and must qualify with the Judge of Probate as provided for therein.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 8, 1930.

The Probate Judge,
Clayton, Barbour County, Ala.

Mortgage—No privilege tax required on mortgages executed to United States to secure indebtedness for "seed loans."

Opinion by Assistant Attorney General Koonce.

Dear Sir:

Some time ago you wrote me, and referred to so-called "seed loan" mortgages on crops which are accepted by the United States under a recent Act of Congress, and under the regulations prescribed by the United States Department of Agriculture.

You request my opinion:

Are the above mortgages exempt from the Alabama mortgage record privilege tax, when they are presented for filing in the office of the judge of probate?

In my opinion the above mortgages are exempt from the Alabama mortgage record privilege tax when they are presented for filing.

I rendered an opinion on June 5, 1929, to the Probate Judge of Baldwin County, in which I held that there is no mortgage tax to be collected on mortgages which are executed for loans to the United States.

I rendered an opinion on June 8, 1929, to the Judge of Probate of Crenshaw County, in which I held that Federal Crop Mortgages are exempt from privilege tax when presented for record.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

Superintendent of Education,
Scottsboro, Jackson County, Ala.

Schools—Driver of school truck required to pay chauffeur's license.—
Age of person employed to drive school truck.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of March 6, 1930. In it you state that the Jackson County Board of Education owns several school trucks.

You request my opinion:

1. Are the drivers of the above trucks required to pay a chauffeur's license?

2. What age must a boy be before he can legally drive a school truck?

In my opinion the drivers of the above trucks must pay a chauffeur's license.

In my opinion a person must be eighteen years of age before he can be employed as a chauffeur to drive a school truck.

I rendered an opinion on December 14, 1929, to the Chairman of the State Tax Commission, in which I held that drivers of school trucks are required to pay chauffeur's license.

Section 25 of an Act approved September 15, 1923, (General Acts 1923, p. 292) provides for payment of chauffeur's license. Said Section 25 contains the provision that no chauffeur's license shall be issued to any person under the age of eighteen years.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Constitutional Law—An Act approved October 31, 1921 (Local Acts 1921, p. 75) is constitutional.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 19, 1930, in which you request my opinion as to the constitutionality of an Act approved October 31, 1921, entitled "An Act to authorize the Commissioners' Court of Conecuh County, Alabama, to pay out of the general fund of said county to the tax assessor of said county, the sum of six hundred dollars per annum for extra assistance in his said office." (Local Acts 1921, p. 75)

I am of the opinion that said Act is constitutional.

A similar Act approved September 25, 1919, (Local Acts, 1919, p. 211) was held to be unconstitutional because the title to that Act read, "To authorize Commissioners' Court etc.", while in the body of the Act itself the word "required" was used. Said Act was held to be unconstitutional and void under Section 45 of the Constitution for the reason that the subject of the Act was not clearly expressed in the title.

First National Bank of Evergreen vs. Haggood, 206 Ala. 308.
Opinions of Attorney General, Biennial Report, 1920-22, p. 113.

The defect in the Act of 1919 was cured in the Act of 1921, supra, which is now under consideration. In said Act the word "authorize" is used both in the title and in the body of the Act. I find no other constitutional objections to same. Therefore, I am of the opinion that the Act under consideration is constitutional.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Judge of Probate,
Florence, Lauderdale County, Alabama.

Court of County Commissioners—should remain in session a full day when there is sufficient business to justify same.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 14, 1930, in which you request my opinion as follows:

What is the least number of hours that make a day for the Commissioners Court when there is sufficient business to justify for being in session for the whole day?

I am of the opinion that if there is sufficient business to justify a Court of County Commissioners remaining in session for a whole day, they should do so. If the business can be transacted in less time, credit should be given for a full day.

The length of time a Court of County Commissioners remains in session is in sound discretion of said court, but said direction should not be abused. It is altogether a question of reasonableness. It will be unreasonable and also an abuse of discretion for a Court of County Commissioners, that has a whole day's business to transact, which could be transacted at that time, to divide same up and receive compensation for several days.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Highway Director,
Highway Department,
CAPITOL.

Highways—Railroad companies are liable for fifty per cent of cost of construction of over-head crossings, underpasses or viaducts over and under its tracks.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 8, 1930, together with other correspondence relative to the construction of an over-head crossing over the tracks of Alabama, Tennessee & Northern Railroad Corporation, F. A. P. 202, Mobile County. The facts as stated are as follows:

The present county road under consideration crosses the tracks of the Southern Railroad at grade twice, and the track of the Alabama, Tennessee & Northern Railroad Corporation once. The Highway Department being desirous of eliminating as many of these dangerous grade crossings as possible decided to relocate part of said road under F. A. P. 202. In thus doing the two grade crossings of the Southern Railroad were eliminated but it was still necessary to cross the tracks of the Alabama, Tennessee & Northern Railroad Corporation, a short distance above their present grade crossing.

The Highway Department gave due notice of its plans to relocate a part of the old country road, and construct an over-head crossing over the tracks of the Alabama, Tennessee & Northern Railroad Corporation, to said railroad. Said railroad refused to cooperate in any way with the Highway Department in this matter. Then the Highway Department let the contract for the construction of the above overhead crossing in compliance with the provisions of the law thereto.

You request my opinion as to whether or not, under the facts as above set out, the Alabama, Tennessee & Northern Railroad Corporation would be liable for fifty per cent of cost of the construction of said overhead crossing.

I am of the opinion that your question should be answered in the affirmative. The authority for such a charge against the railroad company is found in Section 43 of an Act approved August 23, 1927, (General Acts 1927, p. 361, known as the Highway Code). Said Section provides as follows:

"Section 43. ADDITIONAL AUTHORITY OF THE HIGHWAY DEPARTMENT.—The State Highway Department in addition to the right, authority and powers conferred upon it by this article, is authorized to make all such reasonable rules and regulations as the department may deem necessary to carry out the provisions of this article, and; whenever the funds of the State are being expended for the construction, maintenance or repair of a public highway, the State Highway Commission, shall have the power and authority to compel all steam railways

operating in this State, to construct viaducts, tunnels, underpasses, or bridges to the full extent of the width of the right-of-way and over the tracks as owned, or operated by any steam railway, when in the judgment of the State Highway Commission, such viaducts, tunnels, underpasses, or bridges are necessary for the safety of the general public and whereby a dangerous grade crossing is eliminated.

"The State Highway Commission may appropriate out of the funds credited to the Highway Department, for the construction, and maintenance of highways, an amount not to exceed fifty per cent of the cost to construct said viaduct, tunnels, underpasses, or bridges to the full extent of the width of the right-of-way and over the tracks as owned, or operated by any steam railway in this State. If after due notice to a steam railway that such a viaduct, tunnel, underpass or bridge, in the judgment of the State Highway Commission, is necessary to be built, or constructed across the width of the right-of-way and over the tracks of the steam railway, and such steam railway fails, or refuses to comply with the order of the State Highway Commission, as provided in this section, the State Highway Commission is empowered and authorized to forthwith build or construct such viaducts, tunnels, underpasses, or bridges, and the amounts so expended for such construction as provided herein, shall constitute a charge against such steam railway and the State Highway Commission shall render a bill to such steam railway stating the amounts expended and for what purpose, and upon the failure, or refusal of such steam railway to make payment of the amount due the State, the State Highway Commission, shall forward all data and information to the Attorney General of this State, who shall immediately institute a suit in the name of the State of Alabama, as provided by law, for the recovery of the amount as reported by the State Highway Commission, as due by the steam railway for the funds to be expended in the construction of viaducts, tunnels, underpasses or bridges across the width of the right-of-way and over the tracks of such steam railway. Upon the recovery of such funds, the amount shall be paid into the State Treasury and credited to the account of the Highway Department from which such funds were withdrawn; but said railway shall not be required to pay exceeding fifty per cent of the cost thereof."

The Legislature may under the police power of the State, or a right reserved to alter or amend the railroad charter, require railroad companies at their own expense to construct and maintain crossings where streets or highways are established across a railroad already constructed, or to pay a portion of such expense, and the rule applies to crossings by means of a bridge or viaduct as well as to crossings at grade.

33 Cyc. 286.

The Legislature may as a police regulation for the public safety, or under a power reserved to alter or amend a railroad charter, require the abolition of existing crossing at grade between streets or highways and railroads, so that the one shall pass over or under the other by means of a bridge,

viaduct, or undercrossing, or may authorize a municipality to require such change, or may act through the instrumentality of a commission, which may be either general or special, and may require that the expense of such change may be paid either by the railroad company or the county, township, or municipality where the crossing is situated or in part by both.

33 Cyc. 290.

In view of the above, I am of the opinion that, if the provisions of Section 43 of the Highway Code, *supra*, have been fully complied with, the Alabama, Tennessee & Northern Railroad Corporation would be liable for fifty per cent of the cost of construction of an overhead crossing over its tracks, under the facts as above set out.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Superintendent of Education,
Hamilton, Marion County, Alabama.

Schools—County Board of Education has authority to appoint as school trustees only those persons who are legal voters.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 8, 1930.

You request my opinion:

Can a person who is not a legal voter serve in the capacity of school trustee?

In my opinion a person who is not a qualified elector cannot serve in the capacity of a school trustee.

Section 2575, Code of Ala. 1923.

Section 133, Ala. School Code, 1927.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Judge of Probate,
Athens, Limestone County, Alabama.

Court of County Commissioners—no authority to appropriate funds for scholarship.

Opinion by Assistant Attorney General Screws:

Dear Sir:

I have your letter of March 13, 1930, in which you request my opinion as follows:

Has the Court of County Commissioners the authority or right to give a scholarship or pay the expenses of a poor but worthy young man in Medical College at Mobile?

I am of the opinion that the Court of County Commissioners has no such authority. I am unable to find any statutes or the construction of any statutes that could give the Courts of County Commissioners the authority to make an appropriation for scholarships.

Whatever powers the Courts of County Commissioners or the Board of Revenue have is derived from the Legislature. They have no inherent or constitutional powers.

State v. Street, et. al. 23 So. 807.

Opinions of Attorney General, Book 15, p. 5, (Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

Secretary of State,
CAPITOL.

Building and Loan Associations—Consolidation and merger must be effectuated under Article 7 of Chapter 274 (Sections 7037-7044), Code of Alabama, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 22, 1930, in which you request my opinion as to how the consolidation and merger of a building and loan association is effectuated.

I am of the opinion that such consolidation and merger is effectuated under Article 7 of Chapter 274 (Section 7037-7044), Code of Alabama, 1923, which provides for the consolidation and merger of corporations in general.

W.H.

The only provision that I am able to find relative to the consolidation and merger of building and loan associations in particular is sub-section 14 of Section 5 of an Act approved August 26, 1927 (General Acts, 1927, p. 431), which provides as follows:

"(14) Any two or more building and loan associations may unite and become incorporate in one body, with or without any dissolution or the division of the funds of either of them, or any such corporation, association or society may transfer its engagements, funds and property as may be agreed by a unanimous vote of their respective boards of directors, provided, however, that any such consolidation or transfer must also be approved by the Building and Loan Association Board."

Said provision, in my opinion, is not in lieu of Article 7, Chapter 274, supra, but is merely an additional authority for the consolidation and merger of building and loan associations, providing an additional requirement that the same must be approved by the Building and Loan Association Board. Therefore, in order to fully effectuate such a consolidation and merger, the provisions of Article 7 of Chapter 274, supra, must be followed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

 The Superintendent of Banks,
CAPITOL.

Banks—Banks in liquidation on January 1st not required to pay assessment under Section 6287, Code of Alabama, 1923.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 11, 1930, in which you request my opinion as follows:

Is a State Bank that was taken over by the Superintendent of Banks, and in process of liquidation on January 1st, liable for assessment under Section 6287, Code of Alabama, 1923?

I am of the opinion that if a Bank was in liquidation on January 1st, such Bank would not have to pay the assessment under Section 6287, Code of Alabama, 1923.

Section 6287, Code of Alabama, 1923, provides that each bank doing a banking business shall be liable for assessment as set forth in said Section. **Said assessment being due as of January 1st.** If a bank is in liquidation, it is not doing business and therefore is not liable for said assessment.

However, a State Bank will have to pay the assessment based upon its annual report required to be made to the Superintendent of Banks next preceding January 1st.

Opinions of Attorney General, Book 10, p. 214, (office edition).

And a bank that has done business through January 1st of a year is liable for the assessment made during that year. The call of the Superintendent of Banks in nowise controls the question of whether the assessment is payable or not. Whether or not a bank was doing a banking business when the assessment was due, is the controlling factor.

Opinions of Attorney General, Biennial Report 1918-1920, p. 155.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Superintendent,
Bureau of Insurance,
CAPITOL.

Corporations: Who are executive officers under (General Acts of Alabama 1927, p. 34).

Opinion by Assistant Attorney General Smith.

Dear Sir:

I have your letter of March 18, 1930, in which you state as follows:

"Section 449 of the Insurance Laws of Alabama, (General Acts of Alabama, 1927, p. 34), which is known as the Insurance Agency Qualification law, reads as follows:

'The provision of this Act shall not apply to any executive officer or traveling salaried employee of any such insurer, to any reciprocal exchange or to any fraternal societies.'

"The exemption for executive officers referred to in this section is not clear. Most insurance concerns usually have the following officers: President, Vice-President, Secretary, Treasurer, Agency Superintendent or Manager. The by-laws of most insurance concerns usually set out the duties of the officers, but even where this is done, it is not clear to me just which of said officers are entitled to the exemption from complying with the provisions of the Act requiring an agent's license by reason of being executive officers as provided in Section 449 quoted above."

You request my opinion:

What constitutes executive officers referred to in said Section 449?

Webster, in defining the words "executive officers", says: "An 'executive officer' is one on whom resides the power to execute the law."

Executive officers of private corporations generally include directors, president, general manager and other officers of this class.

Western Union Telegraph Co. v. Union Pacific Ry. Co., 3 U. S. Federal Reporter, pp. 721-732.

I am of the opinion that executive officers as used in this statute means president, general manager, vice-president, treasurer and superintendent, and other officers of this character, who exercise executive and administrative authority and powers conferred upon them by the board of directors of the corporation. Who are executive officers is generally determined by the constitution and by-laws of the corporation. As to whether or not an officer or employee is an executive officer of a corporation becomes a question of fact, and should be determined by a reference to the constitution and by-laws of the corporation, and the nature of the duties conferred on said officer or employee by the board of directors of the corporation.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 9, 1930.

The Clerk of the Circuit Court,
Tuscaloosa, Tuscaloosa County, Ala.

Act approved February 18, 1927, (General Acts 1927 p. 52)—construction of.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of April 4, 1930, in which you state that Tuscaloosa County has entered into a contract with the Board of Administration relative to all county convicts sentenced to hard labor from Tuscaloosa County. You also state that you desire a construction of this Act. I assume that you mean an opinion as to the constitutionality of the same and upon that assumption you request my opinion upon the following:

Is the Act approved February 18, 1927 (General Acts 1927, p. 52) constitutional?

In answer to your question I am of the opinion that the Legislature of Alabama acted within legislative competency when it enacted Senate Bill 100 approved Feb. 18, 1927, (General Acts 1927 p. 52).

State vs. Jordan, 122 So. p. 183.

Biennial Report 1926-28, pp. 437-439.

Opinion of Attorney General, Book 16, p. 212, (office edition).

Section 3 of the Act, *supra*, reads as follows:

" * * * The State Board of Administration shall receive said county convicts in the same manner as they now receive State Convicts, and shall pay to the proper county authorities the items of costs provided in Section 3667 of the Code of Alabama as now provided by law. Provided, however, that where these items of costs have been paid to the proper officers for the convicts now serving their sentence the same shall not be again paid."

The title of the Act reads as follows:

"To further regulate the custody, care, maintenance and use of the county convicts by the several counties of the State and by the State through its State Board of Administration and to repeal all laws and parts of laws in conflict herewith."

The test of the Act is whether or not anything is embraced in this Section which may not be referred to in the title.

State vs. Street, 117 Ala. 203.

The conclusion that the subject is not covered by the title should not be reached except by liberality of construction and with freedom from verbal criticism.

I rendered an opinion to the Board of Administration on Feb. 9, 1928 (Biennial Report of Attorney General 1926-28, p. 439) in which I held: " * * * the State Board of Administration is required to pay the cost of all county convicts turned over to the State and said cost is to be paid as provided in Section 3667 of the Code of 1923. In cases where defendants are convicted and sentenced to hard labor, it is my opinion and I hold that the bills of costs * * * are proper charges and should be paid by the Board of Administration."

In an opinion addressed to the Director of Child Welfare Department, February 19, 1930 (Opinions of Attorney General, Book 16, p. 216, office edition), I held * * * that the Act *supra* is merely an authorizing and empowering Act, giving the Board of Revenue or County Commissioners' Court of their respective counties the right at their option to deliver county prisoners to the State Board of Administration where they may be received and used as State convicts and be paid by the State, costs itemized according to Section 6367 of the Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 10, 1930.

Chief Examiner of Accounts,
Department of Examiners of Accounts,
CAPITOL.

Order of Board of Revenue of Conecuh County for superintending
and inspecting public works.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

This is to acknowledge receipt of your letter of May 1, 1930, in which you state that the members of the Board of Revenue of Conecuh County are collecting compensation under a blanket order placed on the minutes at the beginning of each year which reads as follows:

"WHEREAS, The Board of Revenue of Conecuh County, Alabama, deems it to the best interest of Conecuh County and to the upbuilding and upkeep of roads and bridges of said County, that each member of the Board of Revenue be placed in charge of the general supervision of said roads and bridges, and shall have the authority to supervise and direct the working of said roads and building and repairing of said bridges, and selecting suitable persons as overseers of the several beats in their districts and that the said overseers so appointed shall be under the supervision and control of the member of the board of revenue of their district, and the member of each district is allowed \$5.00 per day for actual time employed in looking and supervising road and bridge work and bridge repairing and building, and five cents per mile travelled to and from said work."

You wish to know if the members of the Board of Revenue are entitled to compensation under this blanket order.

I am of the opinion that the members of the Board of Revenue are not entitled to compensation under the blanket order above set out.

Section 4 of an Act approved August 27, 1927, creating Board of Revenue of Conecuh County (Local Act 1927, p. 243) reads as follows:

"Section 4. That the said Board of Revenue shall have all jurisdiction and powers that are now or may be hereafter by law vested in Courts of County Commissioners of this state, and by any special law now vested in the County Commissioners of Conecuh County; and the several members of the said Board of Revenue shall perform all the duties and services and exercise all the powers that are or may be required by law of the several members of the Court of County Commissioners."

Section 6771, Code of Alabama, 1923, among other things provides:

"No allowance shall be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the Commissioners Court, previously made."

Section 4 of an Act approved August 27, 1927, above set out, imposes upon the Board of Revenue all the duties and services of the Courts of County Commissioners, which includes the above quoted part of Section 6771, Code 1923.

The above provision of Section 6771 contemplates an order of the Court of County Commissioners authorizing the specific work at a specific time.

Opinion of Attorney General, Book 8, p. 182, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 10, 1930.

Hon. F. W. Glover, Mayor,
Guntersville, Marshall County, Alabama.

Municipal corporations—Towns automatically fall within the classification of cities and are subject to the laws pertaining thereto, when the official Federal Census shows the population to be over two thousand inhabitants.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 29, 1930, in which you state that Guntersville, Alabama, is at present a town of two thousand or less population. The present mayor and council were elected in 1928 for a term of two years. The 1930 Federal Census will show a population of about three thousand.

You request my opinion as to whether or not the present mayor and council will automatically hold office for another two years without an election.

I am of the opinion that your question should be answered in the affirmative.

Section 1743, Code of Alabama, 1923, provides as follows:

"1743. Municipalities classified into cities and towns.—Municipal corporations now existing, or hereafter organized under this chapter, containing two thousand or more inhabitants, shall be called cities. All incorporated municipalities containing more than one hundred and less than two thousand inhabitants, shall be called towns. The last census, whether federal or taken as herein authorized, shall be taken in determining the population of a city or town. At the next election more than four months after the census shall have been taken and officially announced, if the municipality shows a population which authorizes a change in its government, under this chapter, the proper officers for such a city shall be elected and perform the duties herein prescribed."

Section 1740, Code of Alabama, 1923, provides as follows:

"1740. Powers and rights conferred on all municipalities.—Affirmative action shall not be necessary for cities and towns to acquire the rights, power, and authority granted in this chapter. Municipalities shall, however, hold such elections and pass such ordinances and resolutions as are required by this chapter."

In construing these two Code sections and other sections relative thereto, I am of the opinion that when a town reaches a population of two thousand, said town automatically passes into the next higher classification as provided for in Section 1743, Code of Alabama, 1923, *supra*, and is subject to the laws which govern same.

Section 1754, Code of Alabama, 1923, as amended in an Act approved Sept. 9, 1927, (General Acts 1927, p. 706) provides in part as follows:

"The regular municipal elections in cities and towns shall be held on the third Monday in September, 1908, and biennially thereafter. * * * * * Provided, however, that cities of two thousand population and over, according to the next preceding decennial federal census, shall elect their mayor, and councilmen, and other officers authorized by law to be elected, on the 3rd Monday in September, 1928, and quadrennially thereafter; such officers shall take their offices on the 1st Monday in October following their election; provided further that this shall not affect cities under Commission form of government."

In the instant case an election could not be held in 1930, as Guntersville would no longer be a town under two thousand population. A quadrennial election for a city of over two thousand could not be held until 1932. Therefore, in my opinion, the present incumbents will hold *de facto* offices until 1932, when a legal election could be held. There is no provision for municipal elections other than that contained in Section 1754, Code of Alabama, as amended Sept. 9, 1927, (General Acts 1927, p. 706), *supra*.

The above applies only in case the federal census is officially announced more than four months prior to holding the election (See Section 1743, Code of Alabama, 1923, *supra*.)

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 10, 1930.

State Health Officer pro tem,
Montgomery, Alabama.

State Board of Health regulations pertaining to the handling and sale of milk and milk products—Application to persons donating milk to schools or individuals.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 7, 1930. In it you state that a dairy is being operated on the estate of a part-time resident of Huntsville, and is producing a surplus of milk, which surplus is being delivered free of charge to a school lunch room in the City of Huntsville, said lunch room being operated by a Parent-Teacher Association. You further state that milk is also donated to certain individual housekeepers. You also state that the operator of this dairy objects to the taking of samples of his supply, and contends that the products of his dairy are not subject to regulations because he does not sell milk. You state that Section 3 of the Regulations is as follows:

"Section 3. Permits:—It shall be unlawful for any person to bring into or receive into any city of Alabama or its police jurisdiction for sale, or to sell or offer for sale therein, or to have on hand, any milk or milk product defined in these regulations who does not possess a permit from the health officer and on whose vehicle there does not appear in a conspicuous place the permit number in figures at least three inches high and one and one-half inches wide.

"Such a permit may be revoked by the health officer upon the violation by the holder of any of the provisions of these regulations provided that the holder of said permit shall, after complying with such revocation, have the right of appeal to the Board of Health of the county in which this section was violated."

You request my opinion:

Does the above Section 3 of the Regulations requiring permits authorize the health officer to demand a permit from the dairy referred to above?

In my opinion Section 3 of the Regulations does authorize the health officer to demand a permit from such dairy.

You will observe that the first part of Section 3 of the Regulations contains the provision that it shall be unlawful for any person to bring into or receive into any city of Alabama or its police jurisdiction for sale, or to sell or offer for sale therein, any milk or milk product defined in such Regulations who does not possess a permit from the health officer and on whose vehicle there does not appear in a conspicuous place the permit number. According to my understanding of the facts the operator of the dairy mentioned above, does not sell or offer for sale any milk within the City of Huntsville, or within its police jurisdiction. However, you will observe that the above Sec-

tion 3 contains the provision that it shall be unlawful for any person to have on hand, any milk or milk product defined in such regulations who does not possess a permit from the health officer and on whose vehicle there does not appear in a conspicuous place the permit number.

In my opinion the mere fact that the operator of the dairy does not sell milk or offer for sale milk or milk products as defined in the regulations, will not exempt him from the provisions of said Section 3 of the Regulations relating to permits.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 12, 1930.

Hon. W. S. Long, Secretary,
Alabama State Bridge Corporation,
CAPITOL.

Alabama State Bridge Corporation—Must require contractor to give notice by publication of completion of bridge—Cannot make final payment before the expiration of publication of notice of completion of bridge.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of April 8, 1930. In it you state that the contractor constructing the bridge over the Tombigbee River at Epes has completed the total amount of work provided by his contract with the corporation, and that a final estimate showing the value of the work has been prepared by the engineer.

You request my opinion:

1. Is the contractor referred to above, required to give notice of said completion by advertisement in some newspaper?
2. If such notice is required, can final payment be made him before the expiration of this notice if he furnishes an approved surety bond guaranteeing the payment of all labor, materials, feedstuffs or supplies used in the execution of the work?

In my opinion, the contractor mentioned by you, is required to give notice of said completion by advertisement in some newspaper.

In my opinion final payment cannot be made to the contractor before the expiration of the notice, and the fact that he furnishes an approved surety bond guaranteeing the payment of all labor, materials, feedstuffs or supplies used in the execution of the work, will not exempt him from the provisions of the Highway Code, which requires notice to be given in some newspaper for a period of four consecutive weeks.

I have examined the copy of the contract which you enclosed in your letter, and I find that page twenty-five of such contract provides for final payment. This provision requires the corporation to pay the contractor the amount of the final estimate prepared by the engineer, less any sums that may have been deducted in accordance with the provisions of the contract within thirty (30) days after the final estimate is forwarded by the engineer, provided that the contractor has properly maintained the work specified in the contract.

Subsection (a) of Section 28 of the Highway Code of Alabama of 1927, contains the provision that any person, firm or corporation entering into a contract with this State for the repair, construction or prosecution of any bridge shall be required, before commencing such work, to execute a bond payable to the State, with good and sufficient surety, approved in writing by the authority having charge of the making of such contract, conditioned that such contractor or contractors, shall faithfully perform such contract of the work agreed and contracted to be done, and shall promptly make payment to all persons supplying him or them with labor, materials, feedstuffs or supplies in the execution of the work provided for in such contract.

Subsection (b) of said Section 28, provides that any person, firm or corporation supplying the contractor with labor, materials, feedstuffs or supplies, after the complete performance of the contract and within sixty days therefrom, shall, upon application therefor and upon furnishing affidavit to the authority under the direction of whom such work has been prosecuted, that labor, materials, feedstuff or supplies have been supplied by him or them, and that payment for the same has not been made, be furnished a certified copy of said bond, etc.

Subsection (c) of Section 28, provides that the contractor after completion of the contract shall give notice of said completion by advertisement in some newspaper published within the city or county wherein the work has been done for a period of four (4) successive weeks. Said subsection (c) contains the provision that in no instance shall a final settlement be made upon the contract until the expiration of thirty days after the completion of same.

Subsection (e) of said Section 28, contains the provision that where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof. Said subsection (e) contains the further provision that all actions against the surety must be commenced within sixty (60) days after the complete performance of said contract and final settlement thereof.

I rendered an opinion on March 22, 1928, to the State Highway Department, and I held in said opinion that the above subsection (c) provides that suit on such bond must be commenced within sixty (60) days after the complete performance of the contract and final settlement thereof, and that this provision means that after the Highway Department has made final payment to the contractor, unless the contractor then settles for all labor, materials, feedstuffs and supplies, a party furnishing any of same, may within sixty days after such final payment by the Highway Department, bring suit

on the bond for the amount due him. I also held in said opinion that suit cannot be brought on the bond by a person supplying labor, materials, feed-stuffs or supplies, at any time except within the sixty days period immediately succeeding final payment by the Highway Department. If you have not already done so, I suggest that you examine the opinion which I have just referred to because it explains the provisions of certain other subsections of the Highway Code of 1927. This opinion is found in the Biennial Report of Attorney General, 1926-1928, p. 477.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 12, 1930.

The Judge of Probate,
Heflin, Cleburne County, Alabama.

The money derived by a County from the gasoline tax collected by the State and distributed to the counties must be used exclusively for maintenance and repair of public roads and bridges. "Maintenance and repair" of a public road or bridge presupposes the existence of a public road or bridge to be maintained or repaired. Those words do not include construction of a new public road or bridge.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of March 27th, with map attached, is acknowledged.

From your letter and map, as I construe them, the Court of County Commissioners of Cleburne County is engaged, in places, in repairing a public road that has existed for some time, and, in other places, it is engaged in constructing a new roadway outside the old roadway. When this work of constructing and repairing is completed, there will be one continuous public road made from parts of the old road repaired and parts of the new road constructed.

You ask if, in my opinion, this work may legally be paid for out of the gasoline tax money paid over to the County in accordance with Section 9 of Act No. 340, approved Aug. 27, 1927. (General Acts 1927, pp. 328 and 329), amending the 1923 gasoline tax statute.

So far as necessary here to quote, this Section reads as follows:

"The proceeds of the excise tax prescribed in this Act, shall, when collected, be paid into the State Treasury, and placed to the credit of the sixty-seven counties of the State, and shall be divided and distributed equally among the sixty-seven counties of this State and paid to each of the several counties as provided by law. Provided, however, that all the funds derived by the several counties from said tax shall be expended exclusively for maintenance and repair of roads, highways and bridges

in said county. The use or expenditure of any of said funds in any other manner for any other purpose than as provided herein, by the governing body of any county or any individual member of said body shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the County jail or at hard labor for the County for not less than one nor more than twelve months."

The foregoing is an amendment to Section 8 of Act No. 62, approved Feb. 10, 1923, (General Acts 1923, pp. 37 and 38.) The said Section as originally passed contained the following:

"And such fund so placed to the credit of the road and bridge fund in each county shall be used for the construction and maintenance of the public highways and bridges in such counties and for no other purpose."

In the amendment already quoted from, the word "construction" was left out, and the expenditure was not only confined to maintenance and repair exclusively, but it was provided that to expend such money for anything except maintenance and repair should constitute a misdemeanor with heavy punishment provided therefor.

Each of those words "maintenance" and "repair" presuppose the existence of the thing to be maintained or repaired. The Legislature clearly did not intend that either of them should include construction, since neither literally, has such meaning, and the word "construction" was deliberately left out in the amendment.

The County has other sources of revenue from which the construction of a public road or bridge may be paid for. The fund derived from the gasoline tax collected by the State and distributed to the counties must be used exclusively for maintenance or repair.

It is my opinion that the new parts of the road to be constructed cannot be paid for out of said gasoline tax fund, while the parts of the old road being repaired may be paid for out of the said gasoline fund.

In other words, work of construction of new road cannot be paid for out of said gasoline tax fund, while work of repair on existing public road may be paid for out of said gasoline fund.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 16, 1930.

The State Superintendent of Education,
CAPITOL.

The authority of review given the State Superintendent of Education under rules and regulations promulgated by the State Board of Education is a discretionary power to be exercised whenever and wherever such State Superintendent of Education shall determine is necessary for the best interest of the educational system.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of April 26th. You ask my opinion as to whether or not it is your duty and obligation, as State Superintendent of Education, under Section 71 of the Alabama School Code of 1927, to review actions of County Boards of Education in the matter of apportioning public school funds to City Boards of Education.

In reply will say that, in my opinion, the authority given the State Superintendent of Education "to review actions and orders of County and City Boards of Education and of County Superintendents and City Superintendents of schools in matters relating to finance and other matters seriously affecting the educational interest," is simply for the protection of the educational interests; to be exercised at any time and anywhere that, in the judgment of the State Superintendent of Education, such review is necessary to promote the best interests of the educational system.

Until the State Superintendent of Education shall determine such action necessary on his part, there is no duty nor obligation resting upon him to make such review. The authority is given him to be exercised at his discretion. Of course, wherever a discretionary power is lodged by law, the discretion should be exercised judiciously and should not be abused in one direction or the other.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 22, 1930.

The Judge of Probate,
Birmingham, Jefferson County, Alabama.

Section 8635—Construction of—Purchase of automobile for Jury Commission—no authority therefor.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of May 14, 1930, together with enclosure. You state that the Jury Commission of Jefferson County has demanded that you purchase an automobile for their use. You request my opinion:

Can an automobile be purchased for the use of the Jury Commission under Section 8635 of the Code?

In answer to your question, I am of the opinion that there is no authority of law for you to purchase an automobile for the use of the Jury Commission of Jefferson County.

Section 8635, Code of Alabama, 1923.

The above cited Section of the Code requires the Judge of Probate to purchase the necessary books in which to keep the jury rolls and the record of the proceedings and the necessary cards, stationery, "and things of all kinds," required by the Jury Commission. The words "things of all kinds" do not mean and cannot mean an automobile. They simply mean all kinds of stationery, cards, ink, typewriter, typewriter-ribbons, pen staffs, pen points, etc., which the work of the Commission requires. The Legislature certainly made no provision for the purchase of an automobile for the use of the Jury Commission or the Clerk of the Jury Commission and before public funds can be expended for any purpose there must be some provision of law authorizing such expenditure.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

May 25, 1930.

Mr. Gaston Scott,
Commissioner of Finance & Audit,
State Highway Department,
CAPITOL.

Under terms of contract of Bessemer Engineering Construction Company with the State of Alabama to construct Project 256 B, in Washington-Choctaw Counties, the State Highway Commission has full authority to determine questions of delay and whether or not the contractor or bond company is due the State anything as liquidated damages for delay; but, having determined that liquidated damages are due the State, the State Highway Commission is without authority to release the contractor or bond company from payment of such debt.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of May 22, 1930, is acknowledged. You make the following statement of facts:

The State Highway Department on July 30, 1928, entered into a contract with the Bessemer Engineering & Construction Co. for the construction of 17.32 miles of highway between Yarbo and Silas in Washington-Choctaw Counties, known as State Project 256 B.

The contractors defaulted on this work and the Bond Company, the Union Indemnity Co. took over the contract and finished the work, as provided in the contract.

In making final adjustment of the contract the State Highway Commission found that the Bond Company had exceeded the time limit set for completion of the work to the extent that, under the terms of the contract, liquidated damages were due the State to the amount of Three Thousand Dollars.

You ask my opinion as to whether or not the State Highway Commission has authority to release such Bonding Company from the payment of such liquidated damages.

On examination of the contract in question, I find the following provision:

"The decision of the said State Highway Commission upon any question connected with the execution of this agreement or any failure or delay in the prosecution of the work by the said contractor shall be final and conclusive."

It is my opinion that the State Highway Department has full authority to determine the facts upon which the liquidated damages are, or are not, due the State; but having determined the facts to be such that liquidated damages are due the State, the said State Highway Commission is in my opinion, without authority to release the contractor, or the bond company stepping into his shoes, from the payment of the liquidated damages, or debt, found to be due the State.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 2, 1930.

Hon. D. F. Green,
Superintendent of Banks,
CAPITOL.

Section 251 of the Constitution of Alabama, 1901—Construction of
—Banks—Charters.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 2, 1930, in which you state that a certain Bank in Alabama secured a charter from the Probate Judge of the County, in which said Bank does business, on December 6, 1901. That the charter was granted said bank for the period of thirty years as was authorized at that time by Section 1089, Code of Alabama, 1896.

You request my opinion:

(1) Under Section 251 of the Constitution of 1901 should said bank have renewed its charter at the end of twenty years from the time of the issuance thereof, i.e., Dec. 6, 1901.

(2) Did the probate court have authority at that time to grant a charter to the bank for a period of thirty years. And if so, what is the status of said bank at this time?

In answer to your first question, I am of the opinion, that said bank should have renewed its charter at the expiration of twenty years as was then provided by an Act approved March 19, 1903 (General Acts of Alabama, 1903, p. 160).

Constitution of 1901, Section 251.

Opinions of Attorney General, Biennial Report 1920-22, p. 162.

In answer to your second question, I am of the opinion, that at the date of the issuance of the charter (here the subject of inquiry) the probate court had authority under Section 1087 of the Code of Alabama, 1896, to issue such charter and that the same was valid, providing Article 1 of the Code of Alabama, 1896, relating to banks was complied with.

Section 251 of the Constitution has never been directly construed by the Supreme Court. The Constitution, however, is a limitation upon legislative power, and that section must be construed as prohibiting the chartering of a banking corporation for a greater period than twenty years. That Section (18 of the Constitution of 1875) was intended doubtless to prevent vesting by charter a perpetual right with which future legislatures would be powerless to interfere regardless of how inimical to the public interest, experience might prove the right to be. And the framers of the Constitution evidently had in mind that to permit an extension of a charter for a perpetual period would violate this intention of Section 251 as flagrantly as permitting the right to be given in the charter when first incorporated.

In my opinion the only safe course for your department to pursue is to approve only the charters or extension of charters which are limited to a period of twenty years.

I further advise you that in my opinion it would be best for you as Superintendent of Banks to notify the Bank in question to have its stockholders meet and provide for an extension of its charter for a period of twenty years from the date of such meeting, in compliance with Section 251 of the Constitution, *supra*.

From the facts submitted by you I cannot see where the Bank could suffer or anyone doing business with it on account of its failure to comply with this Section of the Constitution.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 5, 1930.

The State Tax Commission.
CAPITOL.

Construction of Schedule 33 and 40 of Section 361 of General Revenue Act, 1919, (General Acts 1919, p. 406) as related to what is called "miniature golf."

Opinion by Assistant Attorney General Evans.

Gentlemen:

Your letter of March 18, 1930, is acknowledged. You wish my opinion upon the following:

There has been established throughout the State what is called miniature golf links. The proprietor of the links rents, when wanted by a customer, tools with which the game is played. A charge is made each customer for use of links in playing the game.

Is a license due by the proprietor of such links, under either Schedule 33 or Schedule 40 of Section 361 of the Revenue Act, 1919, (General Acts 1919, p. 282, et seq.)?

In reply will say that, in my opinion, "miniature golf links" does not fall within the class of entertainments licensed in said Schedule 33.

The last sentence of this Schedule, in my opinion, clarifies the meaning of expressions used in said Schedule, which might otherwise be obscure. This sentence reads as follows:

"In all cases where such exhibitions shall be in the nature of a continuous show or performance, the license shall be five dollars per day, fifteen dollars per week, or thirty dollars per month."

The Legislature clearly intended, as shown by this last sentence, to license entertainments in the nature of exhibits:

Webster define "exhibition" as follows:

1. The act of exhibiting for inspection, or holding forth to view; manifestations; display.
2. That which is exhibited, held forth or displayed; also, any public show; a display of works of art or of feats of skill, or oratorical or dramatic ability," etc.

It will be noted that the heading of the Schedule is: "concert or exhibitions." While this heading is not conclusive as to what was intended, yet it is, in my opinion, of importance, in such case, in determining what was intended to be licensed.

If a charge were made for admission to witness an exhibition of the skill of those playing the game of miniature golf, this would, in my opinion, fall under the license. The game, in such case, would, in my opinion, become an entertainment where charges are made for admission, and would be in the nature of an exhibition.

Neither, in my opinion, is such golf links a device of the kind licensed by said Schedule 40. The devices there licensed are such as throwing at wooden figures, or any object of like character, striking at an object to test strength, blowing to test lungs.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1930.

Hon. J. P. Stiles,
Judge of Probate,
Birmingham, Jefferson County, Alabama.

The filing tax for recording deeds of trust must be paid under the provisions of Section 21½ of Act No. 163, approved July 22, 1927, (General Acts, 1927, p. 163, et seq.), just as upon other deeds.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I am in receipt of letter from Mr. A. Key Foster, Assistant Trust Officer, Birmingham Trust & Savings Company, with copy of deed of trust, except as to property conveyed, attached, which he sends me, as stated in the letter, at your request, requesting my opinion of the tax law as applicable to such an instrument.

I assume he has reference to Section 21½ of Act No. 163, approved July 22, 1927, (General Acts 1927, p. 163 et seq.) when speaking of the tax law; that he wishes my opinion as to the tax due on filing such instrument for record. So far as necessary here to copy, this section reads as follows:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, except in the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting title to real estate, and deeds and other instruments or conveyances executed prior to Oct. 1st, 1923, shall be received for record unless the following privilege tax or license shall have been paid upon such instrument before the same is offered for record, to-wit"; etc.

In my opinion the instrument in question is clearly a deed which conveys real or personal property and probably both as the property conveyed is not described. It does not fall within any of the exceptions named, unless it be a deed executed prior to October 1, 1923. There is no exemption from this tax by reason of the fact that the property is conveyed in trust. In other words, trust deeds fall within the class of instruments defined and designated

for the tax, and are not included in those classes of such instruments excepted from the tax by the statute.

It does not, in my opinion necessarily follow that all property conveyed by a trust deed must be taken into consideration in fixing the value by which the tax is measured. For instance, where mortgages on real or personal property within this state, which have been recorded in this state and the filing tax thereon has been paid, constitute part of the property conveyed by such deed, the deed as to such property, in my opinion, falls within the exception in the statute with reference to transfer of mortgages. The value of such mortgages should not be included in the sum upon which the amount of tax is estimated. So far as such mortgages are concerned, such instrument operates, so far as this tax is concerned, simply as a transfer of such mortgages.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 12, 1930.

The Tax Collector,
Geneva, Geneva County, Alabama.

Samson Agricultural Credit Association, Inc., being a corporation organized under the general corporation laws of the State, is not, in my opinion exempt from taxation.

State and County taxes assessed upon the assessable property owned by the bank constitute a first lien upon all the property owned by the bank and such taxes must be paid by such bank to the extent of such property, no matter how insolvent such bank may be.

Taxes assessed upon the shares of capital stock in a bank or other corporation, although assessed in the name of the corporation is, in law, not an assessment against the corporation. The corporation has no right to pay such assessment when it is insolvent.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of March 17th is acknowledged. You state, first, that an assessment against Samson Agricultural Credit Association, Inc., is in your hands for collection. This corporation claims it is not due the tax. You ask my opinion as to your duty in the premises.

You state, second, that a state bank has become insolvent and has been taken over for liquidation by the State Superintendent of Banks.

You request my opinion as to its liability for taxes assessed against it.

In reply to your first inquiry I will say that on investigation at the office of the Secretary of State, I find that the Samson Agricultural Credit Association is a domestic corporation, organized under the g

of the State, for dealing in fertilizers, etc. I know of no law which exempts it from taxation. As said in *re Fidelity & Deposit Co. v. Mobile County*, 124 Ala. 145, where the tax books are made out as provided by law, the abstract furnished the Tax Collector is authority for him to collect the taxes, and he is chargeable therewith if he fails to collect.

If the assessment is on the abstract furnished you, it becomes your duty to collect it.

In reply to your second inquiry will say that State and County taxes due by a bank constitute a first lien upon the property owned by the bank. If the bank has any property, the taxes must be made out of such property, no matter how insolvent the bank may be.

The shares of capital stock are not owned by the bank, and, while they are usually assessed in the name of the bank, the assessment of a share is, as matter of law, not an assessment against the bank. Under the statute, the assessment of the shares may be made in the name of the bank and the bank is required to pay the assessment, if it has a surplus or undivided profits out of which such assessment may be paid. (General Acts 1923, p. 152, Section 5). A bank which has no surplus, or undivided profits, is in my opinion, without authority to pay taxes on shares, which are property of the shareholder.

If a share of stock has any value such share may be levied on and sold for payment of taxes assessed against it.

Where the banking corporation is insolvent, it is fair to presume that a share of the capital stock has no value.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

June 20, 1930.

The Judge of Probate,
Tuscaloosa, Tuscaloosa County, Alabama.

Where a mortgage upon real estate is foreclosed under power of sale contained in the mortgage, after advertisement as provided in the mortgage, and the mortgagee or his transferee, to whom the legal title to the property sold is conveyed by the transfer, becomes the purchaser at such sale, what is called a foreclosure deed made to such mortgagee or transferee is but a memorandum of the foreclosure, and conveys no title, the purchaser having the title prior to the execution of such instrument. In such a case, no filing tax is required under Section 21½ of Act No. 163, approved July 22, 1927 (General Acts 1927, p. 163).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of a letter of May 10th is acknowledged. You make the following:

Steiner-Lobman Dry Goods Company offered for record what you term a foreclosure deed. A mortgage on real estate was made to the Board of Trustees of the University of Alabama to secure a debt to it. This mortgage was duly transferred by said Board to Jas. F. Alston and afterwards by him to Steiner-Lobman Dry Goods Company. After the debt secured by the mortgage fell due and was not paid, Steiner-Lobman Dry Goods Company foreclosed said mortgage under power contained in the mortgage, by advertising and selling as provided in the power of sale, and the said Steiner-Lobman Dry Goods Company became the purchaser at the foreclosure sale.

Each of said transfers were properly executed so as to convey the legal title of said real estate to the transferee. The deed in question was made to the purchaser at the foreclosure sale, who was the last transferee.

You ask my opinion as to whether the deed filing tax provided by Section 21½ of Act No. 163, approved July 22, 1927, (General Acts 1927, p. 163) is due on filing such deed for record.

In reply will say that, under the facts as above stated, the legal title to the property in question was in Steiner-Lobman Dry Goods Company at the time of foreclosure. The so-called deed of foreclosure did not convey the property in question to anyone. Conveyance of property, or interest in property, means conveyance of the title to property or to some interest in the property.

In the case mentioned the so-called deed conveyed nothing. The mortgage and the transfers had conveyed the title to the property to Steiner-Lobman Dry Goods Company prior to foreclosure. The foreclosure sale had the effect of cutting off the mortgagor's equity of redemption, and the so-called deed was merely a memorandum of the foreclosure. Such deed conveyed nothing.

Opinion of Attorney General to Hon. T. W. Coleman, Judge of Probate, Calhoun County, of date Oct. 26, 1923.

In cases where the foreclosure deed conveys title, then the filing tax must be paid for filing the deed for record, measured by the value of the property conveyed as provided by the statute.

Opinion Attorney General, 1924-1926, p. 126.

Said Section 21½ provides for the payment of the tax where a deed, bill of sale, or other instrument of like character, which conveys any real or personal property within this State, or which conveys any interest in any such property, with certain exceptions, is offered for record.

In the case stated, the so-called deed did not convey any property, nor did it convey any interest in property. Hence, the tax in question is not due.

In making the statement, I have amplified the statement made by you, as I did not have before me the mortgage or the transfers, and the facts stated by you were not sufficient to base an opinion upon. I enlarged the state-

ment made by you to include what would naturally have been the case. If I have, in any way, mistaken the facts, then my conclusion as to the actual case may be wrong.

If my statement of facts is correct, then, in my opinion, the filing tax fee is not due.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 1, 1930.

The Superintendent of Education,
Hayneville, Lowndes County, Ala.

Schools—County Board of Education cannot pay commission for marketing school warrants.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of June 26, 1930, in which you state that your County Board of Education has been endeavoring to sell warrants in the amount of approximately \$42,000.00, bearing 6% interest for the purpose of obtaining funds with which to erect a high school at Ft. Deposit, but has been unable to consummate the sale. You further state that you now have an offer of par and accrued interest for the warrants, but that it will be necessary for the County Board of Education to pay a sum of money to the purchasers of the warrants to cover the cost of lithographing the warrants; the cost of preparing the seal to affix to the warrants and marketing the warrants. You also state that the Board is satisfied that this expense is necessary in order to market the warrants.

You request my opinion:

Is there any provision of law which would prohibit the County Board of Education paying a reasonable sum to cover the necessary expenses in connection with the lithographing, cost of seal to be attached to warrants, and other expenses incident to the marketing of said warrants?

In my opinion there is no law which authorizes the County Board of Education to pay the purchaser of the warrants a commission for marketing them. However, in my opinion the County Board of Education has authority to pay the actual cost of lithographing, and the cost of preparing a seal to be affixed to the warrants.

Section 281 of the School Code of 1927, contains the provision that county boards of education shall have authority to issue and sell school warrants for the purpose of obtaining funds to erect, repair, enlarge or equip school buildings; said warrants to be sold at a rate not to exceed 6% per annum, including interest.

I rendered the State Superintendent of Education an opinion on September 24, 1929, (Vol. 14, Opinions of Attorney General, 1929, p. 57, office edition) in which I held that a county board of education has authority to pay a reasonable amount for printing warrants, but does not have authority to pay the purchaser of the warrants for the opinion of an attorney. I am enclosing copy of this opinion for your information.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 2, 1930.

The Tax Collector,
Vernon, Lamar County, Alabama.

1. Where petition for establishment of a drainage district has been filed in the Probate Court as provided by Section 4 of Act No. 155, approved July 21, 1927, and has been disallowed as provided by Section 7 of said Act, and the Probate Court has complied with the provisions of said section for judgment and the establishment of the lien upon the lands of petitioners lying in the proposed district and any petitioner has failed to pay the tax levied upon his land before the 31st of December of the year in which levied, and such tax is turned over to the tax collector of the county for collection, as provided in said Section 7, the tax collector should proceed to collect such tax just in manner provided by law for collection of delinquent state and county taxes.

2. There is no provision for the State to become purchaser at such sale in the absence of another purchaser. The parties interested in the proceeds of sale may protect their interests by becoming purchaser, if they see fit.

3. The certificate of purchase made to the purchaser should follow, as nearly as practicable, consistent with the facts of the case, the provisions of Section 256 of the Revenue Act 1919.

4. There being no provision for redemption of the land, so sold, by the owner thereof, it is my opinion that a deed may be made by the probate judge to the purchaser as soon after the sale as practicable. In executing such deed the Judge of Probate should be guided by Sections 266 and 267 as to form, contents and manner of execution as nearly as practicable under the facts of the particular case.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of June 24th. You make the following statement of facts:

A petition for establishment of drainage district No. 3, in Lamar County, Alabama, was filed in the Probate Court of Lamar County, as

provided by Section 4 of Act No. 155, approved July 21, 1927, (General Acts 1927, p. 106).

On the final hearing of said petition, the Court decided against the sufficiency of the petition and dismissed the petition and proceedings at the cost of the petitioners, and did issue an itemized bill of all costs and expenses as provided in Section 7 of said Act. Thereupon the Court did forthwith order the levying and collecting of a uniform acreage tax on all the lands included in the petition, owned by petitioners for organization, to meet the expenses incurred, as provided by Section 7 of said Act. Some of said acreage tax was not paid by the 31st day of December, 1929, the year in which said tax was levied.

This unpaid acreage tax has been turned over to you, as Tax Collector of Lamar County, for collection as provided by said Section 7 of said Act No. 155.

You ask my opinion:

1. How to proceed with such collection?
2. What form of certificate of sale you should execute?
3. Whether or not the engineers who are principally interested in the proceeds of sale should protect their interests by becoming purchasers at such sale, if there is no other responsible bidder bidding the amount necessary to pay the amount of the levy upon the land sold?

In reply will say that the legislative intent in the premises as to collection of such tax must be found directly or inferentially from what is said in the last sentence of said Section 7. This sentence reads as follows:

"If the court at the final hearing shall find against the sufficiency of the petition * * * it shall dismiss the petition and the proceedings at the cost of the petitioners and shall issue an itemized bill of all costs and expenses, which itemized statement of costs and expenses shall have the full force and effect of a judgment and constitute a lien upon the lands of the petitioners within said proposed district, which liens shall be of equal dignity with the lien for general state, county, city, village, school and road taxes, and the court shall forthwith order the levying and collection of a uniform acreage tax on all of the lands included in the petition owned by the petitioners for organization to meet the expenses incurred, and such tax shall be due and payable as soon as levied, and if not paid by the 31st day of December in the year in which it is levied, the same shall become delinquent and shall be turned over to the tax collector of the county, in which the lands are located, for collection, and the collection of such taxes shall be proceeded with in the same manner as delinquent general state and county taxes."

The Legislative intent, in my opinion, was to foreclose this lien for drainage tax in the same manner that the lien for state and county taxes on real estate is foreclosed. The itemized statement of costs and expenses issued by the probate court, together with the order of the probate court levying the tax, in the manner prescribed by said Section 7, and ordering its collection, is to be regarded, for purposes of collection, as equivalent to the levy

and assessment of ordinary state and county taxes. In other words, when the probate court has done all that is required of it, in such a case, by said Section 7, and has turned the matter over to the tax collector for collection, after default, the tax collector should proceed, as nearly as the facts will admit of, just as in cases of delinquent state and county taxes, where the taxes are to be collected by sale of real estate.

The tax collector in my opinion, should demand of the owner of each piece of land owned by a petitioner and located in said district, upon which the lien attaches, in the manner provided by Section 200 of the 1919 Revenue Act, the amount of taxes assessed upon this land, and, if he fails to pay such tax, the tax collector should report to the probate court that he was unable to collect the tax assessed against such land from the owner thereof without a sale of such land, just as provided by Section 240 of the 1919 Revenue Act, and then proceed before the probate court to get an order of sale for such land to pay such tax just as in the case of ordinary delinquent state and county tax.

You can't levy on personal property for the collection of this tax, nor upon any real estate other than that upon which tax is a lien. It, therefore, follows that where the petitioner refuses to pay the tax assessed upon his land, you cannot collect such tax without a sale of such land, as that is the only means provided.

When application is made to the probate court by you as provided in said Section 240, all the rest of the procedure is similar to the procedure for sale of lands for payment of ordinary state and county taxes. The probate court issues similar notices and makes similar orders and judgments, and you, as tax collector, proceed just as you would in case of sale of lands to collect state and county taxes. Of course, all these proceedings should show what the tax is which is being collected and should set up the facts which show a valid levy and assessment of such tax and the facts constituting the lien which is being foreclosed.

The certificate of purchase should be similar to that used in ordinary tax sales, as provided by Section 256 of the Revenue Act, 1919, but showing the nature of the particular sale.

In my opinion, since no provision is made for redemption of lands so sold, a deed may be made to the purchaser by the judge of probate at any time after the same.

There is no authority for buying such land in for the State, in the absence of another purchaser. The parties interested in the proceeds of sale may protect themselves at such sale by becoming purchasers, if they desire to do so.

The legislative intent in an act is the law, and, in the foregoing, I have tried to ascertain and elaborate its intent from the few words used in the act with reference to this particular tax.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 2, 1930.

The Chairman,
Jefferson County Jury Commission,
Birmingham, Alabama.

Jury Commission—Powers and duties.

Opinion by Assistant Attorney General Brassell.

Dear Sir: -

I have your letter of June 11, 1930, requesting that I advise you concerning the powers and duties of the Jury Commission.

You request my opinion:

1. Is it the duty of the Jury Commission to place the name of every male citizen between the ages of twenty-one and sixty-five in the jury box?
2. How shall the Jury Commission proceed to fill the jury box and how should the minutes of their meeting be prepared.
3. What discretion does the Jury Commission have in filling the jury box and can the courts pass upon the qualifications for persons or is that the function of the Jury Commission?
4. Can the Jury Commission empty the box each October of all names and refill the same?
5. On what grounds can the jury box or the action of the Jury Commission in filling the same be attacked and can the costs be charged to the attacking parties (petitioners)?
6. When mandamus is filed against the Jury Commission can the costs thereof be taxed against the Commission?

In answer to your first question I am of the opinion that it is incumbent upon the Jury Commission to cause the Clerk of said Commission to procure under the direction of the Commission the names of each male citizen of the County over the age of twenty-one years and under the age of sixty-five years, their occupation, place of residence and place of business.

Section 8591, Code of Alabama, 1923.

In answer to your second question, I am of the opinion that when the Clerk has obtained the names of male citizens over the age of twenty-one and under sixty-five that the Jury Commission shall take and consider each person, their fitness and qualifications for jury service.

In answer to your third question, I am of the opinion that in filling the jury box that the Jury Commission is clothed with discretion. The Commission passes upon the qualifications vel non of the persons so selected and unless there is fraud or an abuse of the discretion imposed, then the courts are without authority to pass upon the fitness of the persons so selected for jury service.

In answer to your fourth question, I am of the opinion that the Jury Commission shall meet in the courthouse on the first Monday in October in

each year and make in a well-bound book a roll of the male citizens living in the county possessing the qualifications for jurors. The discretion rests upon said Commission to pass upon the eligibility of the persons so selected and the competency of those selected being left entirely with said Commission.

Nelson v. State, 171 Ala. 25.

In answer to your fifth question I am of the opinion that a petition for writ of mandamus can be filed against the Jury Commission when there is evidence of fraud in the filling of the jury box.

In answer to your sixth question, I am of the opinion that whenever it appears to the trial court that a person's name has been placed upon the jury roll, who does not possess the qualifications required by law the court may at its discretion upon excusing the person from service, tax the cost of summoning such person and of his attendance against the Clerk of the Jury Commission or against any one or more of the Commissioners.

Section 8634, Code of Alabama, 1923.

Under your first question the names of the persons may be obtained by the Clerk of the Jury Commission from the tax records, the poll tax records, city directory or telephone directory. He must also visit each precinct for that purpose. Of course, the statute does not contemplate that the names of every person over the age of twenty-one and under sixty-five years be placed in the jury box. It imposes discretion upon the Jury Commission and it is the duty of such commission before placing the name of any citizen on the jury roll to ascertain whether or not such person possesses the qualifications and in so doing the courts cannot inquire into the acts of the Commission. It is to be observed that the provisions of the chapter relating to jurors is merely director and not mandatory, the Commission at all times being charged with the duty of passing upon the eligibility of those selected for jury service.—Nelson ex rel v. State, ex rel, 182 Ala. 449.

Under your second question in filling the jury box the Commission should take the names obtained by the Clerk and pass upon the eligibility of each person and when the Commission in its judgment concludes that a citizen possesses the qualifications it shall then prepare the jury roll, precinct by precinct, and place on said jury roll the names of persons selected together with their street address, occupation and place of business and after the jury roll is complete then the Commission shall prepare cards with the names, addresses, occupations, and places of business of such persons so selected and place the same in the jury box. Thereafter, when the box is filled the minutes of the Commission should show the date and place of meeting, the Commissioners present and that the names on the jury roll and the cards corresponding therewith, and placed in the jury box shall constitute the persons selected for jury service and said minutes should be signed by the Chairman of the Commission and attested by the Clerk.

Under your third question all the discretion in the selection of persons for jury service vests in the Jury Commission and the Courts cannot inquire into the discretion of said Commission.—Nelson ex rel v. State, supra.

Under your fourth question if the jury box or the number of names should become exhausted or so far depleted that there are not a sufficient number of jurors for a term of court, the Jury Commission must meet and prepare a new jury roll and refill the jury box.—Authorities, *supra*.

Under the fifth question submitted by you it is my opinion that if there should be any evidence of fraud in the filling of the jury box by the Jury Commission or should the same be tampered with by unauthorized persons, a writ of mandamus will lie against the Jury Commission and the Court may order said Commission to refill the box in compliance with the statute. And should evidence of fraud on the part of the Jury Commission be discovered, of course the costs could be taxed against the members of said Commission.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 9, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

The fees provided for the Clerk of the Circuit Court of Conecuh County by Local Act No. 395, approved August 26, 1927 (Local Acts, 1927, page 328) being applicable to Conecuh County only is in contravention of Section 96 of the Constitution of Alabama, rendering said Act void.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of June 10, 1930, is acknowledged.

You request my opinion as to the constitutionality of Local Act No. 395, approved August 26, 1927 (Local Acts 1927, page 328).

In reply will say that in my opinion the provisions in Section 4 of said Act for one dollar as fee for taking affidavit of complaint and issuing warrant of arrest by the Clerk of the Circuit Court of Conecuh County renders the Act unconstitutional, as being in contravention of Section 96 of the Constitution of Alabama. So far as this Act is concerned this fee of one dollar applies only to the Clerk of the Circuit Court of Conecuh County and can apply only to him. Said Section 96 of the Constitution provides:

"The legislature shall not enact any law not applicable to all the counties of the state, regulating * * * fees * * * of public officers."

It is perfectly plain that said fee of one dollar applies only to Conecuh County. This, in my opinion, is contrary to the foregoing provision of the Constitution.

In fact, all the compensation provided for by said Act are fees which apply to Conecuh County only. This, in my judgment, is in contravention of said Section 96 of the Constitution of the State of Alabama.

I am, therefore, of the opinion that said Act is void.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 21, 1930.

The Judge of Probate,
Moulton, Lawrence County, Ala.

The words: "Provided, that only the value in excess of any mortgages or vendors lien upon any property within this state on which the mortgage has been paid, shall be taxable under this section" as used in Section 21½ of Act No. 163, approved July 22, 1927 (Acts 1927, page 163) has reference to mortgages and vendors liens existing at time of execution of deed and to which such deed is subject.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of July 15th just to hand. The deed tax proposition to which you refer, I suppose, is that contained in your letter of February 15, 1930.

In said letter you made the following statement of facts:

John Jones buys a tract of land from John Smith at an agreed price of two thousand dollars, which is the fair and reasonable value of the land. Jones has only one thousand dollars, but he borrows from a bank one thousand dollars and thus pays Smith for the land and receives a deed from him. Thereupon Jones executes a mortgage on said land to said bank to secure the one thousand dollars so borrowed. The bank files this mortgage for record and pays the privilege tax thereon. Subsequently, Jones offers to file his deed for record.

You wish to know whether Jones is due a filing tax based on two thousand dollars, the full value of the land conveyed by the deed, or should there be deducted from the value of the land conveyed the amount of the mortgage debt on said land made by Jones to the bank.

In reply will say that, in my opinion, under the facts stated, the full value of the land conveyed is the proper measure of value. The tax in question is levied by Section 21½ of Act No. 163, approved July 22, 1927 (Acts 1927, page 163 et seq.). So far as is necessary for consideration of the question asked this Section reads as follows:

"No deed, * * *, which conveys any real property within this state, or which conveys any interest in any such property, * * *, shall be re-

ceived for record unless the following privilege * * * tax shall have been paid upon such instrument before the same is offered for record, to-wit:

"Upon all such instruments which are executed to convey real * * * property situated in this state of the value of five hundred dollars or less there shall be paid the sum of fifty cents, and upon all such instruments executed to convey real * * * property situated in this state of more than five hundred dollars in value there shall be paid the sum of fifty cents for each five hundred dollars or fraction thereof in value of property conveyed by such instrument. Provided, that only the value in excess of any mortgages or vendors lien upon any property within this state on which the mortgage tax has been paid, shall be taxable under this section."

In the case stated, when the deed was executed conveying the property there was no mortgage on the property conveyed, nor was there any vendors lien thereon. The fact that the grantee subsequently gave a mortgage upon the property conveyed by the deed is immaterial so far as said tax is concerned.

It is my opinion that said proviso refers to mortgages and vendors lien existing on the property at the time of the execution of the deed and not to all mortgages and vendors liens that may exist at the time the deed is offered for filing for record.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 24, 1930.

The Judge of Probate,
Greensboro, Hale County, Ala.

Fees—Judges of Probate not entitled to for transferring voters' names from old poll list book to new book.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of June 6, 1930.

You request my opinion:

Is the Judge of Probate entitled to a fee for his services in transferring voters' names from one poll list book to a new book?

I am of the opinion he is not. No officer can collect a fee or commission for a service unless he is able to point to some direct statute or law authorizing it.

Dent and Magruder v. State, 42 Ala. 514.
Ex rel. Pollard v. Brewer, 59 Ala. 130.

Section 3734, Code of Alabama, 1923, provides as follows:

Section 3734. No fee charged unless expressly authorized—The law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by an officer.

Section 7285, Code of Alabama, 1923, sets out fees allowed to Judges of Probate, and among other things provides:

“For preparing list of registered voters as required by Section 187 of the Constitution, two and one-half cents a copy for each voter enrolled, to be paid by the county commissioners in each county.”

Neither Section 7285 of the Code, *supra*, nor Section 187 of the Constitution of Alabama, 1901, provides for compensation for Judges of Probate for transferring voters' names from one poll list book to another.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

July 28, 1930.

Hon. C. A. Moffett,
President, Board of Administration,
CAPITOL.

Each of Sections 2897, 2898, 2899, 2900, 2901, 2902, 2906, 2907, 2909 and 2911 of Code 1923, is valid and binding and not repealed by Section 48 of said Code.

Contracts for each of the four classes of work provided by Section 2898 of the Code should be let as an entirety.

Opinion by Assistant Attorney General Evans.

Dear Sir:

You ask that I give you my opinion as to proper construction of Section 48 of Code of Alabama, 1923.

Second, you request my opinion further as to whether or not each of the four classes of printing enumerated in Section 2896 of the Code must be let under one and the same contract or could either of said classes be divided into subdivisions and each subdivision let separately to the lowest bidder.

Said Section 48 reads substantially as follows:

“The State Board of Administration is vested with control and authority over and is charged with the duty of providing for the public printing and binding designated in and subject to the limitations of Section 69 of the State Constitution and more set forth in Sections 2895 and 2896 of this Code.”

Section—(578) of Chapter—(19), Article—(2) and Sections—(1649 to 1655) inclusive, and sections—(1657)—(1658)—(1660) and—(1662) of said Chapter—(40) of the Political Code are hereby repealed.

After a careful reading and consideration of all the sections of the Code involved in an interpretation of said Section 48, I am clearly of the opinion that placing in said Section 48 the part of the Act approved February 10, 1923, which repealed certain Sections of the Code of 1907 was a mere inadvertence and has no legal effect whatever upon any succeeding Section of the Code, 1923.

The Code as adopted by the Legislature in said Section 48 did not mention any Section of the Code, 1923, as being repealed. But Sections 2897, 2898, 2899, 2900, 2901, 2902, 2906, 2907, 2909, and 2911 of the Code, 1923, were all written so as to be consistent with the provision of Section 48, vesting the Board of Administration with control and authority over and charging it with the duty of providing for the public printing and binding designated in and subject to the limitations of Section 69 of the State Constitution and more particularly set forth in Sections 2895 and 2896 of the Code, 1923. Each of said sections of the Code were duly adopted in the Code and are valid and binding.

In answer to second request will say that Section 2898 of the Code clearly shows in my opinion, that it was the legislative intent that contract for each of the four classes was to be let as a whole.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 6, 1930.

The First National Bank,
County Depository,
Tuscumbia, Colbert County, Alabama.

Judge of Probate—Compensation for road service.

Opinion by Assistant Attorney General Screws.

Gentlemen:

I have your letter of May 14, 1930, in which you state that the Court of County Commissioners of Colbert County adopted a resolution setting forth the fact that the County is engaged in an extensive program of road building, and the Judge of Probate is required to travel in inspecting said work, and for that purpose, an appropriation of \$20.00 per month was made to be paid to the Judge of Probate for reimbursement for such expenses. Said resolution does not require an itemized statement of the expenses.

You request my opinion as to whether or not the county depository would be justified in paying a warrant drawn in accordance with the above resolution?

I am of the opinion that your question should be answered in the negative. The Judge of Probate is not entitled to any other compensation for road services other than that provided for by a subdivision of Section 7285, Code of Alabama, 1923, which is as follows:

" * * * Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, annually, to be paid out of the county treasury, not exceeding . . . \$400.00. But this shall not apply to any probate judge who receives net annual compensation from his office exceeding \$5,000.00 * * * ."

Before any amount can be allowed under this section for ex officio services of the Judge of Probate in connection with the roads and bridges of his county, he must itemize such service and make oath thereto. The compensation allowed shall be the fair and reasonable value of the services.

Section 7265 Code of Alabama, 1923.

Opinions of Attorney General, Book 15, p. 34, (office edition).

Furthermore, if the net annual compensation exceeds \$5,000.00, Section 7285, *supra*, does not apply and he would not be entitled to any amount as ex officio fees for this service.

Mason County v. Abercrombie, 184 Ala. 283.

In my opinion the above applies not only to ex officio fees allowed to the Judge of Probate for inspecting the roads and bridges of the County, but also to all expenses incurred in connection therewith. In other words, **all compensation**, including fees and expenses, shall not exceed \$400.00 per annum. This does not mean that the Judge of Probate will be entitled to this amount as a matter of course. The itemized and sworn statement must be fair and reasonable and he will be entitled to only the amount so shown, not to exceed \$400.00 per annum.

Opinions of the Attorney General, Book 15, p. 34, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Aug. 8, 1930.

Hon. Leo F. Eldridge,
Chairman, Mobile County Democratic Executive Committee,
Mobile, Alabama.

At a primary election, a sheriff, or his deputy, may enter a polling place for the purpose of preserving good order; but only one may so enter. Section 639, Code of Alabama.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your telegram of August 7th was duly received.

You ask my opinion upon the following:

Can a police officer, deputy sheriff, state law enforcement officer or any other person go inside polling places where an election is being conducted, or are election officers in full control of elections?

In reply to your inquiry will say that the duties and authority of sheriffs as to primary elections for state and county are clearly set forth in Section 639 of the Code of Alabama. This Section reads as follows:

"Duties of Sheriff; provisions for canvassing returns.—The sheriff of each county on the day of such primary election shall be present in person or by deputy at each election precinct or voting district where elections are held and shall preserve good order. All duties imposed and powers conferred upon the sheriff in said county and district elections by this section are hereby imposed and conferred on the marshal or chief of police in all municipal primary elections. Not more than one officer shall be allowed, however, to enter the polling place. The sheriff shall also perform the duty of returning officer as in general elections. It shall be his duty to return to the chairman of the county executive committee or governing authority at the office of the judge of probate at the county seat of each of the political parties participating in the election, the ballot boxes and returns which have been delivered to him by the officers of said election. Such ballot boxes and returns shall not be allowed to leave his possession and must be returned by him not later than Thursday noon following the election. It shall be the duty of the county executive committee or other governing authority of each of the political parties participating in the said primary to be present at said time and place for the purpose of receiving said ballot boxes and returns and canvassing and declaring the results."

Of course, the election officers are in full control of the election so far as the discharge of their duties are concerned.

The sheriff, or deputy, is present for the purpose of preserving good order. Not more than one sheriff or deputy can lawfully enter the polling place, and then only for the purpose of preserving good order.

Of course, anyone entitled to vote may enter for the purpose of voting, whether he be sheriff, deputy or otherwise, but he must retire from the polling place when he has voted. Only one sheriff or deputy has the freedom, as such sheriff or deputy, of entering the polling place and then only for the purpose of preserving good order.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 11, 1930.

Superintendent of Insurance,
CAPITOL.

Traveling salaried employees of an insurance company are exempt from the provisions of Act No. 37, approved February 10, 1927, (Acts 1927, page 34).

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of July 9th is acknowledged.

You ask that I examine Act No. 37, approved February 10, 1927, (Acts 1927, page 34) and give you my opinion as to whether or not a traveling salaried employee of an insurance company, whose business is, under such employment, to solicit insurance for such company, as its agent, is exempt from the provisions of said Act.

In reply will say that Section 1 of said Act defines who are to be deemed insurance agents under said Act.

Section 2 of said Act provides that "no person shall engage in business as an insurance agent until he shall have complied with the laws governing insurance agents and procured a license in accordance with the provisions of this Act.

Section 3 of said Act provides for the examination of persons applying for the first time for a license to act as an insurance agent and for issuance of license to such as are found qualified.

Section 4 of this Act provides how and in what cases a license issued may be revoked or suspended, etc.

Section 5 of this Act provides for certifying to the Superintendent of Insurance by each insurance company of the names of all agents appointed by it to solicit, negotiate or effect contracts of insurance, etc.

Section 6 of said Act provides:

"The provisions of this Act shall not apply to any executive officer or traveling salaried employee of any such insurer" etc.

The foregoing seems, of itself, to answer your question.

If the person in question is a *bona fide* traveling salaried employee by salary paid by the insurance company—then, in my opinion, such employee is exempt from the provisions of said Act. Such is the plain language of Section 6 of said Act.

Executive officers of the company are exempt from the provisions of the Act just as are traveling salaried employees.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Aug. 13, 1930.

The Judge of Probate,
Jasper, Walker County, Ala.

Census—The amount of a privilege license tax, when determined on a population basis, is governed by the last official census immediately prior to the due date of the license.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 9, 1930, in which you inquire as to the effect of the new census figures relative to privilege licenses.

Where the amount of the license tax is determined by the population of the county or city, I am of the opinion that same is to be based on the last official United States census prior to the due date of the license. In other words, if the 1930 Federal census has been determined and officially promulgated by October 1, 1930, the amount of a privilege license tax, if determined on the population basis of town, city or county, will be governed by the 1930 Federal census.

The reasoning of the cases in point and a common sense construction of the census law force us to the conclusion that the date of the first preliminary announcement by the director of the census, being itself an official announcement, authorized by the law, is the date when the census becomes effective as to any particular county or city within the State.

Biennial Report of Attorney General, 1920-1922, p. 171.

Section 76 of Act No. 163, approved July 22, 1927, (Acts 1927, page 186).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 16, 1930.

Hon. N. T. Hawkins,
Register in Chancery,
Fort Payne, DeKalb County, Alabama.

A Register of the Circuit Court, in equity, is entitled to the commissions on sales, as provided in Section 7283 of the Code of Alabama, where motor vehicles are sold under decree and order of said court as provided by Section 4780 of said Code.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of former date in regard to commissions on sales, by Register in Chancery, of motor vehicles seized by prohibition officers and condemned in equity as provided by Section 4780 of the Code of Alabama.

You ask, if, in my opinion, you are entitled, in such a case, to the commissions provided, in Section 7283 of the Code, for registers "on sales."

In reply will say that, in my opinion, the said provision in said Section 7283 applies to all sales made under decree and order of the Circuit Court, in equity, unless, in the specific case, the law otherwise provides. To determine whether or not the law otherwise provides in the case under consideration, requires a construction of Section 4782 of the Code. Said Section reads as follows:

"The proceeds of the sale of any such property forfeited to the state, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the cost of seizure and of keeping the property pending the proceedings, be applied as follows," etc.

It is my opinion that where decree of condemnation and order of sale is made by the Circuit Court, in equity, and the property is sold by the Register in accordance with such decree and order of court, the commission allowed registers on sales by said Section 7283 of the Code constitute a part of the expenses in the cause and should be paid as provided by said Section 4782 of the Code.

I find no provision of statute forbidding the allowance of commissions in such a case, nor any other provision for compensation of the Register for making such sale, from which it might be inferred that the commissions on sales provided for in said Section 7283 were not intended to be allowed in such cases.

Of course, an officer takes office *cum onere*, and must perform the duties of his office without compensation where no compensation is provided for by law. But, in the instant case, it is my opinion that compensation for making sale under decree and order of the Circuit Court, in equity, is clearly pro-

vided in Section 7283 and is nowhere denied either directly or by implication.

The opinion from this office of date August 2nd, 1929, to Register in Chancery of DeKalb County is hereby overruled and withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 22, 1930.

The Judge of Probate,
Grove Hill, Clarke County, Alabama.

Board of Review has no authority to summon witnesses to appear before it. Those who appear, appear voluntarily and cannot be legally paid for such appearance by the county.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of July 10th was duly received. You ask my opinion based upon the following facts:

Mr. Tom Scott, in the summer of 1929, was employed by the State Tax Commission to cruise the timber belonging to the Scotch Lumber Company in Clarke County, for the purpose of ascertaining its value for taxation purposes. A report of his estimate was made to the State Tax Commission and to the Tax Assessor of Clarke County.

Upon the information thus obtained and other information in its possession, the Board of Review of Clarke County, in April, 1930, as provided by Section 54 of the Revenue Act, 1923, (General Acts 1923, p. 180), made a tentative assessment of the property of said company in said County. Therefore, the Tax Assessor gave notice as provided by Section 56 of said Revenue Act and the said company filed objections in writing to such assessment valuation as provided in said Section 56.

For the day fixed by law in June 1930, Section 57 of said Revenue Act, for hearing said objection, the Board of Review summoned said Scott to appear before it on such hearing and give testimony for the State and County as to the value of the timber so cruised by him. Mr. Scott appeared and testified in behalf of State and County.

For appearing and testifying he has presented a bill for Ninety Dollars—Thirty Dollars for the day consumed in going, Thirty Dollars for the day consumed in testifying and Thirty Dollars for the day consumed in returning home.

You wish my opinion as to whether or not this bill can legally be paid out of any funds belonging to Clarke County.

In reply will say that the Board of Review is without authority to summon a witness to appear before it. It is presumed to act upon information obtained by it otherwise, so far as State and County are concerned. In the case mentioned, it had before it the report of Mr. Scott, as well, doubtless,

as other information. It is the duty of the Tax Assessor of the County to inform himself, as far as practicable, upon such matters. The State Tax Commission had obtained the information contained in the report of Mr. Scott.

All that is said in the statute about witnesses before the Board of Review is found in Section 57 of said 1923 Revenue Act. It reads as follows:

"At such sitting the property owner may appear in person, or by an agent or attorney and produce evidence in support of objections, if any, to any assessment or valuation theretofore made, and it shall be the duty of the Board of Review to examine, under oath, any complaining property owner, and to examine any other witnesses, under oath, as to the fair and reasonable market value of the property of such owner, and if it is found from the evidence that the valuation theretofore placed was not sixty per cent of the reasonable market value of such property, whether more or less, then said valuation or assessment shall be corrected so that it will show sixty per cent of fair and reasonable market value, and such corrected amount shall constitute the assessed value of such property. But if it is found from the evidence that the assessed value placed on the property was sixty per cent of a fair and reasonable market value thereof, the said value shall stand as the assessed value of said property, unless an appeal is taken therefrom, as provided by this Act."

In my opinion, it is presumed that when the Board of Review fixed the tentative value at its first sitting, it was in possession of evidence, which, in its opinion, justified the value placed. The object of providing for objection by the taxpayer was to give him an opportunity of showing the error in conclusion reached by the Board of Review on the information already in its possession. In doing this, the taxpayer must himself be sworn and examined and any witnesses he may have and offer must be sworn and examined.

If the evidence thus produced, convinces the Board of Review that it was in error in fixing the valuation in the first instance, then it becomes the duty of the Board of Review to adjust the assessed value in accordance with all the information it has upon the subject. If the evidence produced by the taxpayer fails to reasonably satisfy said Board that the original assessment valuation was erroneous then the Board should let the original assessment valuation stand. The taxpayer then has the right to appeal to the Circuit Court of the County, as provided by Section 59 of said 1923 Revenue Act. In the Circuit Court, the matter is tried *de novo*, and the burden is upon the State and County to reasonably satisfy the Court, by legal evidence, the assessable value of such property. Here the State and County are plaintiffs and the taxpayer, defendant; each side may summon witnesses and enforce their attendance. Such witnesses are paid as witnesses in civil cases.

In contemplation of law, Mr. Scott voluntarily appeared before the Board of Review, and there is, in my opinion, no way by which the County can legally pay for such appearance.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 25, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Official Bonds—Tax Collector liable on official bond for loss of State funds deposited in a bank, although he takes indemnifying bond from bank. Indemnifying of bondsmen liable to Tax Collector.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of April 18, 1930, in which you set out the following statement of facts:

"On February 14th the Tax Collector of Autauga County, in endeavoring to make a settlement of taxes collected for the State of Alabama in Autauga County, sent to the State Treasurer a check on the Autauga Banking and Trust Company for the amount due on his collections in the sum of approximately \$1,600.00.

"This check was by the State Treasurer placed in the hands of the First National Bank of Montgomery for collection, and about the time it reached the Autauga Banking and Trust Company and probably just a day or so before, the said bank closed its doors. The Autauga Banking and Trust Company sent its exchange to the First National Bank in payment of the amount of the Tax Collector's check, but the said Autauga Banking and Trust Company failed before the First National Bank realized on the exchange sent it. The Autauga Banking and Trust Company was not a State Depository and the Tax Collector of Autauga County, before ever putting any money in the said bank, took an indemnifying bond guaranteeing the safety of all monies he might put officially in the said Autauga Banking and Trust Company. This money never has reached the State Treasurer. I wrote the Tax Collector stating that his indemnifying bond was liable for the amount of money which had not reached the State Treasury, but it seems that the indemnifying bond, being a personal one, has brought forward the question that the check sent to the State Treasurer by the said Tax Collector was accepted in a way by the State Treasurer in payment of the taxes, and that four or five days were allowed to lapse from the sending of the check to the endeavoring to collect the same, or at least that much time had lapsed when the check was presented about February 19th.

"You are of course aware that Section 3973 of the Code of Alabama of 1923 provides that a Tax Collector, in order to avoid a charge of embezzlement of public funds, is required to take an indemnifying bond before making the deposits, or to take a good and sufficient security to secure the funds deposited.

"I know of no provision of law providing any other way for the Tax Collector to discharge himself from liability for monies collected for the State except by the actual payment to the State Treasurer of the Collections made by him, and which are due the State, and although he sent a check, which at the time of the sending may have been presumed to be good, it was his own convenience that he was subserving and not an exact following of the law.

"I call your attention to Section 3085 of the Code of Alabama of 1923, in which it is stated that the Tax Collector must pay to the State Treasurer all State taxes that are due from him to the State, having reference to his semi-monthly settlements. I also call your attention to Section 3053 providing that the Tax Collector is allowed the costs of transmitting money, collected by him, to the State Treasurer."

Under the above statement of facts you request my opinion:

1st. Is the indemnifying bond taken by the tax collector liable for such monies as the Autauga Banking and Trust Company had on hand deposited by the said tax collector at the time it closed its door?

2nd. Is the tax collector liable on his official bond to the State of Alabama for any monies that he may have had due the State and which was in the hands of the Autauga Banking and Trust Company at the time of the failure of said Bank?

The answer to your first inquiry is in the affirmative. Under the provisions of Section 5973 Code of Alabama, 1923, a Tax Collector is expressly exempted from **criminal liability only**, when he in good faith requires and takes from a bank in which State funds are deposited good and sufficient security to secure the payment of the funds deposited. It appears that the tax collector in the instant case required and took from the Autauga Banking and Trust Company an indemnifying bond guaranteeing the deposits of State funds made by him. But for this provision in Section 3973 *supra*, a Tax Collector who deposits State funds in a bank would be guilty of embezzlement, in the event of failure of said bank, resulting in the loss of said State funds.

The bondsmen who executed the indemnifying bond to the tax collector are liable to him for the loss sustained. I see nothing in your statement of facts as to the manner of handling the tax collector's check by the State Treasurer, which would relieve the indemnifying bondsmen of their liability to the tax collector.

The answer to your second inquiry is also in the affirmative. The Tax Collector is liable for all funds collected by him until the same reaches the State Treasurer unless the same are deposited in a State Depository in the

name of the State Treasurer in accordance with the provisions of Section 894 of the Code of Alabama, 1923. The receipt by the State Treasurer of a check on the Autauga Banking and Trust Company in the sum of \$1600.00 and the depositing of said check in the First National Bank by the State Treasurer did not constitute a settlement with him as required by law. Section 3085 of the Code of Alabama, 1923, provides that the Tax Collector within five days after making his report to the State Auditor must pay to the State Treasurer all State taxes then due from him to the State, and Section 3055 of the Code of Alabama, 1923, provides for the actual cost of transmitting collections to the State Treasurer. Any convenient method of transmitting State Funds to the State Treasurer adopted by the Tax Collector other than the law provides, is taken at his own risk and he and his bondsmen on his official bond are liable to the State in the event of loss, regardless of the fact that he takes an indemnifying bond guaranteeing the safety of his deposits in a bank. While those who executed the indemnifying bond are liable to the tax collector for the loss, this does not relieve the tax collector and his bondsmen on his official bond from civil liability to the State in the event the bondsmen on the indemnifying bond fail to pay the same. Section 3973 of the Code, *supra*, does not exempt the tax collector and his official bondsmen from civil liability. Thomas, J. speaking for the Court in the recent case of *National Surety Company v. State, et. al*, 219 Ala. 609, 612, says: "The provisions of Section 3973, Code of 1923, as indicated, were under the subject of embezzlement by public officers, and exempt said officers from criminal liability, for depositing the revenues of the State or County in a bank in "good faith," who require and take from the bank "good and sufficient security."

It will be noted that this provision of the statute **does not exempt from civil liability.**

National Surety Co. v. State et al., 219 Ala. 609, 612.

I am therefore of the opinion that the tax collector and his bondsmen on his official bond are liable to the State of Alabama for this money which failed to reach the State Treasurer.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 26, 1930.

The President,
Board of Revenue,
Columbiana, Shelby County, Alabama.

Commissioners Courts and Boards of Revenue without power to regulate charges for ferriage on ferries and bridges individually operated in the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 21, 1930, in which you state that you have several ferries operated by individuals in Shelby County.

You request my opinion:

Is the authority or power in the Public Service Commission of the State of Alabama or in the Commissioners Court or Board of Revenue to fix the tolls to be charged by the operators of ferry boats?

It is my opinion that the power to supervise ferries and fix the rate of toll where the ferries are being operated by individuals in this State, lies with the Public Service Commission and not with the Board of Revenue or Commissioners Court.

It is true that under Section 6446 of the Code of Alabama, 1923, the courts of county commissioners or boards of revenue are granted the power to regulate and fix the tolls which privately operated ferries may charge, and if this statute stood alone there could be no doubt as to this right as it dates back many years; but I am of the opinion that this statute has been repealed by implication. If not repealed it has been crippled to such an extent that what is left of it, so far as this matter is concerned, is of but little consequence. Under Article 8, Section 9740 to 9824 both inclusive, Code of Alabama, 1923, under the head of public utilities, you will find Section 9792 of this Article places all ferries, so far as their operation is concerned, when not operated by municipalities or counties, under the "Commission." Ferries and toll bridges which are owned and operated by municipalities and counties are exempt from the supervision of the "Commission" by Section 9741, Code of Alabama, 1923. Since we must conclude that ferries and toll bridges are public utilities and come under the supervision of the Commission as set out by Section 9742, *supra*, then if they are public utilities under the supervision of the "Commission" the next question is—where do we find its power to regulate toll charges. This is provided for by Section 9741, Code of Alabama, 1923, and is a part of Article 8 *supra*. This Section is as follows:

"9741. Supervision and regulation of utilities.—The commission shall have general and exclusive power and jurisdiction to regulate and supervise every utility in respect to its rates and service regulations, and in respect of its franchises, licenses and contracts insofar as they affect its rates and service regulations, and in respect of its financing and se-

curities in accordance with the provisions and subject to the reservations of this article, and to do all things necessary and convenient in the exercise of such power and jurisdiction. Nothing in this article, however, shall be deemed to confer upon the commission power and jurisdiction to regulate and supervise in respect of rates and service regulations any utility owned and operated by any municipal corporation in the state. From time to time the commission may make such recommendations to any municipal corporation which owns and operates a utility as from its experience in the administration of this article may seem to the commission necessary or advisable."

The section above quoted, we admit, comes in direct conflict with Section 6446, *supra*, as by the latter section all supervision as to ferries of the various counties of the State, come under the direct supervision of the board of revenue or commissioners court. This brings us to the duty of reconciling the two statutes if we can, and if this cannot be done, then to decide which must stand and which must fall. We readily concede that there is an irreconcilable conflict between these laws. This brings us to decide which must fall and which must stand. As stated above, Section 6446, *supra*, has been on our statute books for many years. Section 9741 was passed by the Legislature and was approved October 1, 1920, (General Acts 1920, p. 38). Therefore, Section 9741 being the latest enactment, and its power coming as it does in direct conflict with the provisions of Section 6446, *supra*, must be construed to repeal Section 6446 so far as the fixing of toll in connection with any privately operated ferries or toll bridges within the state. If it does not directly repeal Section 6446, so far as it relates to tolls of ferries, certainly it does by implication.

Steele v. the State, 61 Ala. 213-218.

Therefore, it is my opinion that supervision of ferries, so far as the rate of ferriage which may be charged, is a matter which comes under the direction and supervision of the Public Service Commission.

Biennial Report of Attorney General 1924-1926, p. 221.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 26, 1930.

The Judge of Probate,
Dothan, Houston County, Alabama.

A woman thirty years of age becoming an inhabitant of the State of Alabama in January 1921, and remaining such inhabitant until October 1, 1929, not having paid any poll tax prior to October 1, 1929, is due nine poll taxes to make her a qualified elector.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of August 22, 1930, just to hand. You make the following statement of facts:

Mrs. Kate Rudolph became a resident of Houston County, Alabama, on or about January 8, 1921, and has remained a resident of Houston County, Alabama, ever since. In January 1930, she was duly registered as a qualified voter by the Board of Registrars of Houston County, giving her age as 41 years.

She had not paid any poll tax prior to October 1, 1929. She applied to the Tax Collector of Houston County prior to February 1, 1930, to pay all poll tax due by her and was informed by him that she owed for the years 1922 to 1929, inclusive, making eight years, totaling \$12.00. This she paid.

She appears on the list of voters as a qualified voter.

You ask my opinion as to whether or not, under facts stated, Mrs. Rudolph is a qualified voter in Alabama.

In reply will say that the XIX Amendment to the Constitution of the United States was declared on the 26th day of August, 1920, to have been ratified. This amendment provides:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Section 2. Congress shall have the power to enforce this Article by appropriate legislation."

In discussing the effect of this Amendment, the Supreme Court of Alabama, speaking through Chief Justice Anderson, in the case of *Graves v. Eubanks*, 205 Ala. 175, says:

"This amendment automatically strikes from the state laws, organic and statutory, all discriminatory features authorizing one sex to vote and excluding the other, or placing conditions or burdens upon one not placed upon the other as a condition precedent to the right to vote, but in no wise interferes with, changes or alters state laws with reference to elections that cannot and do not amount to a discrimination in favor of one sex against the other. It protects the man and woman alike, and a

burden cannot be placed upon one sex that is not put upon the other, nor can a privilege, benefit, or exemption be given one to the exclusion of the other. The said amendment, by its own force and effect, strikes from Section 177 of our State Constitution the word "male," as used in defining who are or may become electors, as well as where used in other parts of our organic or statutory laws when used in connection with the right and qualification to vote, and also strikes therefrom the use of the masculine pronoun wherever it appears, so as to make the same include and applicable to both sexes. And as the said amendment prohibits a discrimination against women by Section 177 and perhaps other provisions of our State law, it likewise prohibits a discrimination against men by Sections 178 and 194 of our Constitution, and has the same effect upon these provisions as to the elimination of the male sex as when used in Section 177 and other provisions. The result is that upon the final ratification of the Nineteenth Amendment it had the effect of making our organic as well as statutory laws applicable to **men and women alike**, and placed all women in the State upon the same footing with men, and those who were over twenty-one years of age and under forty-five prior to October 1, 1920, were, so to speak, put in the same shoes of a man who became twenty-one years of age between the ratification of the amendment and said first day of October, 1920. In other words, if the man became liable to a poll tax payable October 1, 1920, and delinquent the first of the following February, the women who were over twenty-one and under forty-five years of age are likewise liable for said poll tax as a condition precedent to the right to vote in succeeding elections."

It thus appears that the first poll tax due by women between the ages of twenty-one and forty-five years, then resident in Alabama, was on October 1, 1920.—Section 194, Constitution of Alabama; *Graves v. Eubanks*, 215 Ala. 175.

Mrs. Rudolph becoming an inhabitant of Alabama in January, 1921, was due her first poll tax in Alabama on October 1, 1921. She was not due a poll tax for the poll tax year beginning October 1, 1920, for the reason that she had not, at that time, become an inhabitant of the State of Alabama. The status of a person as to age and residence on October 1st of each year, unless exempted therefrom by law, determines his or her liability for poll tax.—*Shepherd v. Sartain*, 185 Ala. 441, 29th Head Note.

Since the adoption of the XIX Amendment to the Constitution of the United States, no discrimination in the matter of voting can be made by law between men and women. Whatever is required of one is, by said XIX Amendment, required of the other.

It is, therefore, clear that the first poll tax due by Mrs. Rudolph, under the facts stated, was on October 1, 1921; not having paid any poll tax prior to October 1, 1920, she was then due to pay nine poll taxes in order to entitle her to vote; or, in other words, make her a qualified voter.—Code, Section 261.

The fact that she acted in good faith, or that the tax collector misinformed her, is immaterial. There was no legal duty resting upon the tax

collector to give her information upon the subject. The duty was upon her to tender to the tax collector the full amount of poll tax due by her and upon the tax collector, when so tendered, to receive it and give her a receipt for each of the years so paid.

There is no provision made in the law for voting except upon payment of all poll tax due since the Constitution of Alabama, 1901, became operative. No excuse or exception is provided for.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 26, 1930.

Hon. C. A. Moffett,
President, Board of Administration,
CAPITOL.

Alabama Historical Quarterly is not a report or other official publication within the meaning of Section 1408, Code of Alabama, 1923.

Opinion by Assistant Attorney General Evans.

Dear Sir:

I have your letter of August 21, 1930. You make the following statement of facts:

The Department of Archives and History has ordered one thousand copies of the Alabama Historical Quarterly.

You ask my opinion if, under the facts above stated, two hundred and fifty copies of such Quarterly, in addition to the one thousand ordered, must be printed in order to comply with Section 1408 of the Code of Alabama, 1923.

In reply to your inquiry will say that, in my opinion, Section 1408 has no application in the case stated.

It is my opinion that the Alabama Historical Quarterly is not a report or other official publication of any executive office, department, commission, bureau, board or state institution within the meaning and intent of said Section.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

August 27, 1930.

The Treasurer,
Dothan, Houston County, Alabama.

Budgets—Payment of county claims—Treasurer's duties.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your two requests for an opinion by this office as to the duty of the treasurer vel non to pay current expenses as well as the budget adopted by the Board of Revenue.

You request my opinion:

1. Is it the duty of the Treasurer to accumulate sufficient funds to pay the entire budget as mentioned in letter number one?
2. Is it the duty of the Treasurer where current income being insufficient to meet both preferred and unpreferred claims in full as is set out in resolution adopted by the Board of Revenue to pay preferred claims in their order before paying unpreferred claims?

In answer to your first question, I am of opinion that it is first the duty of the Treasurer to pay the preferred claims notwithstanding the budget adopted by the Board of Revenue.

Biennial Report of Attorney General, 1922-24, p. 97.
Ramage, etc. v. Folmar, 214 Ala. 661.

In answer to your second question, I am of opinion that it is the duty of the Treasurer to first accumulate sufficient funds to pay preferred claims before he can pay the unpreferred claims.

Rhodes v. Marengo County Bank, 205 Ala. 667.

The budget as adopted, in and of itself would not warrant the payment of unpreferred claims above those preferred by law.—Subsection 6 of Section 231 of the Code of Alabama, 1923, prescribing the order of payment among preferred claims against the County and the Act approved Sept. 29, 1923, amending section 146, Code of 1907, now Section 224 of the Code of 1923 are more to the point, and it necessarily follows that you as Treasurer must pay all preferred claims before the payment of any unpreferred claims.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 3, 1930.

The Superintendent of Education,
Bay Minette, Baldwin County, Alabama.

County Board of Education cannot pay for paving of sidewalks in front of school property.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of March 20, 1920, in which you state that the Town of Bay Minette had made an assessment for sidewalk improvements against high school property.

You request my opinion:

Can the County Board of Education legally pay for paving of sidewalks paved by the Town of Bay Minette, which said paving has been assessed against high school property?

In my opinion the County Board of Education cannot legally pay the assessment for paving levied by the Town of Bay Minette, without violating Section 91 of the Constitution of 1901.

Opinions of Attorney General, Book 9, (office edition), p. 221.

The Legislature cannot tax state or county property. Municipal corporations are a creation of the Legislature. It therefore follows municipal corporations nor any other agency of the State cannot tax State or County property without violating Section 91 of the Constitution.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 3, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

Filing Tax—Federal Reserve Banks not subject thereto.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 10, 1930, in which you request my opinion as to whether or not there should be charged a mortgage tax on a mortgage made to the Federal Reserve Bank.

I am of the opinion that your question should be answered in the negative. Section 531 of Title 12 of the United States Code Annotated, provides as follows:

"Section 531. Exemption from taxation. Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes from real estate. (Dec. 23, 1913, c. 6, paragraph 7, 33 Stat. 258; Mar. 3, 1919, c. 101, paragraph 1, 40 Stat. 1314).

The Federal, State or local agencies have power to levy taxes only upon the real estate of the Federal Reserve Bank. The Federal Reserve Bank is exempt from all other forms of taxation. A filing tax is in no sense a tax upon real estate; same being a privilege tax.

Under a similar statute relative to Federal Land Banks, (Sec. 931 of Title 12 of the United States Code Annotated) exempting same from taxation, a State could not levy a filing tax for recording mortgages.

Crosland v. Federal Land Bank of New Orleans, 261 U. S. 374.

Opinions of Attorney General, Book 12, p. 19, (office edition).

The exemption from taxation clause in the Act relative to Federal Reserve Banks is not as broad as that contained in the Act relative to Federal Land Banks. Therefore, in my opinion, if a filing tax for recording mortgages cannot be imposed upon a Federal Land Bank, it could not be imposed upon a Federal Reserve Bank.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 3, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Alabama School of Trade—Property of—Appropriations to—Constitutionality of Acts creating.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

This will acknowledge receipt of your letter of recent date.

In it you refer me to several Acts of the Legislature creating and establishing the Alabama School of Trades and Industry namely: An Act approved the 11th day of April, 1911. (General Acts 1911, p. 383) an Act approved September 26, 1919, (General Acts 1919, p. 645), an Act approved September 29, 1923, (General Acts 1923, p. 627) also Article 37, p. 174, Section 10, p. 295, and Section 13, p. 299 of School Code of Alabama, 1927.

You request my opinion:

1. Whether there was any authority of law for the hundred acres of land, specifically referred to in the Acts of the Legislature of 1911 and 1919, to be given back or to be deeded back to the person, concern, association, or corporation which originally deeded the land to the school?

2. Whether any part of the appropriations referred to in Section 13, page 299, of the School Code can be used for maintenance purposes or for paying the ordinary running expenses of this School?

3. Whether the Acts of the Legislature of 1911 and 1919 referred to above, in which it is apparently sought by a Special Act to confer corporate power, are Constitutional?

4. Whether or not in view of all the Acts referred to, any property conveyed to the Alabama School of Trades belongs to the State of Alabama or to the corporation formed?

5. If this is a private corporation has the State any authority to make appropriations to it?

In answer to the first question, I am of the opinion it should be answered in the affirmative.

In answer to your second question, I am of the opinion it should be answered in the affirmative.

In answer to your third question, I am of the opinion it should be answered in the affirmative.

In answer to your fourth question, I am of the opinion that the property conveyed to the Alabama School of Trades belongs to the corporation formed until September 30, 1930, when it shall then vest in the State of Alabama.

In answer to your fifth question, I am of the opinion that this is not a private corporation but a public one and the State has the authority to make appropriations to it.

An Act approved the 11th day of April 1911 (General Acts 1911, p. 383) created and established at Ragland, Alabama, the Alabama School of Trades and Industry. This Act was incorporated into an Act approved Sept. 29, 1919 (General Acts 1919, p. 645) providing for a complete educational system for the State of Alabama. This latter act among other things provides that the said school shall be located at Ragland, Alabama, and on a lot or parcel of land containing an area of not less than one hundred (100) acres heretofore deeded to the Alabama School of Trades and Industry as incorporated under an Act approved April 12, 1911. "The hundred acres referred to was deeded by the Trout Creek Coal & Mining Co. to the Trustees of the Alabama School of Trades and Industry on the 28th day of September 1911. Thereafter the Legislature by an Act approved September 29, 1923 (General Acts 1923, p. 627) provided for the removal of this School from Ragland, Alabama, to another location to be selected by the Board of Trustees of said School with the proviso "provided, however, that no change shall be made for the location of said school unless all persons residing in St. Clair County, Alabama, have been refunded all money heretofore paid or donated by them for the use of said School, with interest thereon from date of such payment.

Subsequently, on to-wit the 15th day of November, 1924, the Alabama School of Trades and Industries deeded this hundred acres to Watt T. Brown being presumably the owner of the Trout Creek Coal & Mining Company, the original grantor. As the Legislature specifically provides for the refunding of all money paid or donated by citizens of St. Clair County the question here involved is the construction that should be placed upon the word "money". Whether or not "money" was used in the sense of property, of whatever nature.

The land was donated for the same purpose as the money, namely; the establishment of the School at Ragland, and when this School was moved from Ragland, it is clearly manifest on the face of the Act of September 29, 1923, *supra*, that all donations of whatever nature should be returned to all parties making such donations. When it is shown that it was the intent to attribute to the word "money" a specific meaning which is more comprehensive, that meaning will be adopted and may comprehend any class of property.

Prison Association of Virginia vs. Russell's Admin., 49 S. E. 966.

Vreeland vs. Vreeland, 56 Atl. 1089.

The appropriation made to the Alabama School of Trades and Industries by the State by Section 13, p. 298-299, of Alabama School Code, 1927, provides that such appropriation is made for the purpose of "providing additions to grounds, buildings and equipment and for the payment of outstanding indebtedness incurred for capital outlay." I am unable to find any provision allowing this appropriation to be used for maintenance purposes or for paying the ordinary running expenses of the school. It must be used only for the purposes above set out by Section 13, *supra*.

The Alabama School of Trades and Industry, although a corporation organized by Special Acts of the 1911 and 1919 Legislature, *supra*, is not within the inhibitions of Section 229 of the Alabama Constitution of 1901. The corporation authorized is not intended as a private agency. It has no capital stock. No profit or other advantage is to be realized for the personal benefit of its members. It is intended to put into use and operation public funds and agencies of the State for the common benefit of the people of the State.

Alabama State Bridge Corporation et al vs. Smith, 217 Ala. 311.

Section 484, page 175, School Code, 1927, referring to the Alabama School of Trades, provides:

"484. Trustees. The Governor shall appoint five trustees to serve until September 30, 1930, after which the entire management and control of such school shall be vested in the State Board of Education, who shall constitute a board of control for the said school."

So until September 30, 1930, all the property conveyed to the School vests in the corporation formed, at which time it vests in the State Board of Education or in other words the State of Alabama.

As set out above in answer to your fifth question, I am of the opinion that this is not a private corporation but a public one inuring to the benefit of the public generally and appropriations made to this School are lawful.

Alabama State Bridge Corporation et al vs. Smith, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 3, 1930.

Judge of Probate,
Tuscumbia, Colbert County, Alabama.

Poll tax: Women who become 21 years of age prior to October 1, 1920, must pay poll tax for that year.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of April 19, 1930, in which you request my opinion:

Can women vote who have not paid their poll tax for 1920?

In order to properly answer the question, we must first determine whether or not the women were liable for poll tax during the year 1920, and this question depends, among other things, upon the date in 1920 they became 21 years of age.

The Nineteenth Amendment to the Federal Constitution became effective August 26, 1920, and reads as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

This amendment by its own force and effect strikes from Section 177 of the Alabama Constitution the word "male", as used in defining who are or may become electors, as well as where used in other parts of our organic or statutory laws, when used in connection with the right and qualifications to vote, and also strikes therefrom the masculine pronoun wherever it appears so as to make the same include both sexes.

Graves vs. Eubank, 205 Ala. 174, 175.

Since the Nineteenth Amendment became operative prior to October 1, 1920, all women who were over 21 years of age and under 45 years of age on said date, became liable for the payment of the poll tax due on said date and delinquent on the 1st day of February following.

Under the provisions of Section 1 of an Act approved Sept. 27, 1920 (General and Local Acts, 1920, Special Session 1920, p. 1), every "inhabitant" in this State over the age of 21 years and under the age of 45 years, who are not exempted, are liable for the payment of poll tax.

Therefore, answering your question, all women who were liable for poll tax for the year 1920, and have not paid the same, cannot vote in the approaching election this year. The payment of **all poll tax due** is one of the conditions upon which a person is allowed to vote in Alabama.

Section 178, Constitution of Alabama.

Opinion of Attorney General, Book 16, p. 56, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 4, 1930.

The Coroner,
Dothan, Houston County, Ala.

Jurors summoned in Coroner's investigation—how paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 10, 1930, in which you state that you are coroner of Houston County and that you have occasion to summon jurors in the investigation of deaths in your county. The Court of County Commissioners has refused to pay the jurors who have been summoned in such investigations; their reason for so doing is that payment of jurors of this character is not included in their budget for the county. You request my opinion:

1. How are said jurors paid:
2. Does the fact that the County fails to include money for this purpose in the budget for the year relieve it from paying?

Answering your first inquiry, jurors who have been summoned in investigations by the coroners are paid under authority of Section 4557 and 3761, Code of Alabama, 1923, and are paid as other jurors summons in the Circuit Court or other court of like jurisdiction from the general fund of the county, when properly certified.

Answering your second inquiry, it is my opinion that these jurors have to be paid and it does not depend upon whether or not the county commissioners, in fixing their budget for the county for any one year, make an appropriation to cover such payment.

See Section 4557, Code of Alabama, 1923.

Also, Sections 3761, 224, 225, 228 and 231, Code of Alabama, 1923.

Hawkins et. al. v. Duncan, 103 Ala. 398.

State ex rel. v. Waldrop, Clerk, v. Hayden, Coroner, 204 Ala. 325.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 4, 1930.

The Judge of Probate,
Luverne, Crenshaw County, Ala.

Clerk of Circuit Court—Local Act providing additional allowance for is unconstitutional.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of January 4, 1930, in which you state that the Clerk of the Circuit Court of Crenshaw County is paid \$400.00 per annum for ex officio services.

You request my opinion:

Is said clerk entitled to an additional \$2.00 per day for an assistant to keep the minutes of said court while said court is in session as provided by a Local Act approved September 15, 1915 (Local Acts 1915, p. 376)?

I am of the opinion that your inquiry should be answered in the negative.

Section 1 of the Local Act approved September 15, 1915, *supra*, reads as follows:

"Section 1. That the court of county commissioners of Crenshaw County, Alabama, be and it is hereby authorized to pay the clerk of the circuit court of said county two dollars per day, as a preferred claim, out of the general fund of said county, during term time of said circuit court of said county, for the purpose of paying an assistant to record the minutes of said court, and to assist him otherwise in the discharge of his duties as such clerk while said court is in session."

Section 7279, Code of Alabama, 1923, is as follows.

"7279. Fees of clerks for keeping minutes of court.—Clerks of the circuit courts in the counties where the ex officio fees of clerks are limited to two hundred dollars or less, shall be allowed out of the county treasury of the respective counties two dollars per day for the time the circuit court is in session in the county of which he is clerk, for keeping the minutes of his said court, warrants for such service to be drawn by the probate judge of the respective counties; but said claim shall be first

presented to and passed upon by the commissioners' court or board of revenue of the respective counties."

Section 96 of the Constitution of Alabama, 1901, provides that "The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Section 104, subdivision 24, of the Constitution provides that "The Legislature shall not pass a special, private or local law in any of the following cases:

"(24) Creating, increasing or decreasing fees, percentages or allowances of public offices."

Section 104, subdivision 24 of the Constitution, *supra*, has been construed by the Supreme Court in the case of *Miller, Treasurer, v. Griffith*, 171 Ala. 337, 342, as being confined in its application to an incumbent in office at the time of the passage of an Act, hence it has no application here.

Section 96 of the Constitution, *supra*, provides that "the Legislature shall not enact any law not applicable to all the counties in the State regulating * * * fees, commissions or allowances of public officers." It cannot be denied that the Legislature in enacting the Local Act here involved has enacted a "law not applicable to all the counties in the State." The only remaining question then is, does the Act regulate "fees, commissions or allowances of public officers"?

It seems to me to be free from doubt that the Act does regulate indirectly the "fees, commissions or allowances" of the clerk of the circuit court, who is a public officer. Before the Act was passed the clerk of the circuit court received certain fees, commissions or allowances provided by law for certain specified work to be done by him. The Local Act here in question does not place any additional duties upon the clerk of the circuit court. Now that the provisions of the Act give him an additional \$2.00 per day during term time of the circuit court and place the expense thereof upon the county and the fee, commission or allowance received by him, are increased, and of course they cannot be increased or otherwise affected without being "regulated" within the purview of Section 96 of the Constitution, *supra*.

In *McFountain, Judge of Probate, v. State ex rel. Russell, Sheriff*, 83 So. 53, the court, in referring to a Local Act affecting Monroe County (Local Acts 1907, p. 36), which conferred additional jurisdiction upon the county court and contained certain provisions as to fees of certain officers said:

"Local Acts 1907, p. 36, was repealed by Section 6 of Acts 1915, p. 864: Moreover if such were not the case, it would in so far as the fees in question are concerned, be repugnant to Section 96 of the Constitution of 1901."

In view of what is said above, it is my opinion that the Act is unconstitutional and void in that it is in direct violation of the provisions of Section 96 of the Constitution of 1901.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 4, 1930.

President, First National Bank,
County Depository,
Fort Payne, DeKalb County, Ala.

County Depository—Not liable on payment of warrants properly drawn for the payment of expenses legally chargeable to the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 10, 1930, together with a copy of the resolution passed by the Court of County Commissioners of DeKalb County. Said resolution provides that the county funds derived from gasoline tax be kept in four separate accounts apportioned equally to each district.

You request my opinion as to whether or not the county depository would be liable for the payment of warrants regularly drawn by the Judge of Probate against said accounts?

I am of the opinion that if the warrants are regularly drawn by the Judge of Probate in accordance with Section 321, Code of Alabama, 1923, for the purposes for which the gasoline fund is to be expended—that is, exclusively for the maintenance and repair of roads, highways and bridges in the county—the county depository would not be liable for paying same.

But a county depository is liable if it pays a warrant which has been allowed or issued for a debt not properly chargeable to the county, although the warrant has been signed by an officer who is authorized by law to sign and issue warrants.

Opinions of Attorney General, (Biennial Report 1920-1922, pp. 135, 373).

There is no statutory inhibition against the Court of County Commissioners so dividing the gasoline fund. Said Court has judicial authority in this respect. If said Court deems it expedient to so divide the gasoline fund, same, in my opinion, may be legally done.

But as long as said fund is used exclusively for the maintenance and repair of roads, highways and bridges anywhere in the county, it is a legal charge against the county.

Opinions of Attorney General (Biennial Report, 1926-1928, p. 329)

And as long as a warrant is properly drawn by the Judge of Probate in accordance with Section 321, Code of Alabama, 1923, for a purpose legally chargeable to the County, the County Depository should pay said warrant, and would not be liable for so paying same.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 4, 1930.

The Clerk of the Circuit Court,
Geneva, Geneva County, Ala.

Poll tax—Time of payment.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of April 14, 1930, relative to the time of payment of poll taxes. You request my opinion:

A citizen becomes twenty-one years of age June 18, 1928. He registers, pays poll tax for 1929, but fails to pay for 1928. Is he due a poll tax for that year, i. e. 1928?

In answer to your question, I am of the opinion that a person who becomes twenty-one years of age June 18, 1928, is due a poll tax on the first day of October, 1928, and has until the first day of February of the ensuing year to pay same.

Constitution of 1901, Sec. 194.

Graves v. Eubanks, 205 Ala. 174.

Biennial Report of Attorney General, 1926-1928, p. 405.

The Constitution levies the poll tax according to the age at the time the tax is declared to be due, namely, October first of each year.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 4, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

County depository has no authority to advance its own money and pay county warrants and charge the county interest on such advance.

Board of Revenue of County has no authority to pay such interest charge.

Opinion by Assistant Attorney General Evans.

Dear Sir:

This acknowledges receipt of your letter of August 29th, 1930. You make the following statement of facts:

The Board of Revenue of Tuscaloosa County, as provided by Article 2 of Chapter 17 of the Code of Alabama, 1923, designated a depository for the County funds of said County.

In numbers of instances, when the funds of the County, on deposit with it, would be exhausted, the County depository would pay out of its own funds county warrants presented to it for payment. It charged the money so paid by it to the County with interest thereon.

You ask my opinion as to whether or not there is any authority of law for a County depository to thus make itself a creditor of the County and charge interest on such credit, or has the Board of Revenue of the County any authority to pay such depository interest on such advances.

In reply will say that the County depository is purely of statutory creation and has only such powers and duties as are prescribed by statute. I find no statute conferring such authority upon a County depository. The attempt, on the part of the depository, to make such a charge should, in my opinion, be treated as an error in its bookkeeping, since there was no authority for entering the charge in the account.

Since the County does not owe for the interest on such advance, it is very clear that the Board of Revenue of said County is without authority to pay such depository such interest charge.

I find no statute which, in my opinion, would authorize the Board of Revenue of a County to enter into a contract to that effect with a County depository, and, certainly, it could not ratify afterward what it could not have contracted for in the first instance.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 4, 1930.

The Coroner,
Dothan, Houston County, Alabama.

Coroner's inquest—fees of—Must be approved by Commissioners Court.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of Apr. 14, 1930.

In it you state that you have held two inquests under order of the Circuit Solicitor. That you have filed the necessary papers with both the Court of County Commissioners and the Clerk of the Circuit Court for the payment of inquest fees to the members of the coroner's jury and the doctor summoned by you. That both the Court of County Commissioners and the Clerk of the Circuit Court have refused payment of these fees. You request my opinion:

How fees for members of a coroner's jury and doctor summoned by you for an inquest shall be collected when payment refused by Commissioners Court?

Payment of fees for members of a coroner's jury and doctor summoned for inquest, is discretionary with Commissioners Court, and cannot be collected unless approved by it, unless same are taxed and collected as cost against the person who is convicted for killing the person on whose body the inquest was held.

Section 3761 of Code of Alabama, 1923, providing that jurors summoned by a coroner to hold an inquest are entitled to the same compensation allowed grand and petit jurors, to be paid in the same manner, means that coroner's jurors are to be allowed the same compensation as grand and petit jurors, which must be paid out of the county treasury **in the same manner as the other fees for holding a coroner's inquest are paid.**

Hawkins et al. v. Duncan, 103 Ala. 398.

An Act approved Sept. 9, 1927, (Acts 1927, p. 497, amending Section 4569 of the Code, 1923, fixes the fee of the physician summoned by the coroner for an inquest and provides that said fee shall be paid out of the county treasury upon certificate of the coroner certifying that such services have been rendered.

Section 3752 of the Code, 1923, provides fees for holding coroner's inquest as follows:

"3752. Fees for inquest; how taxed and paid; post mortem examination and fees therefor; other fees.—Fees for holding the inquest shall be paid out of the county treasury, when the inquest has been held under the order of a judge of a court of record or circuit or county solicitor and in the opinion of the court of county commissioners or board of revenue,

the inquest should have been held; and such fees must be also certified by the coroner to the clerk of the circuit court of the county, and must be taxed as costs against any person who is convicted for killing the person on whose body the inquest was held, and be collected like other costs in criminal cases; and, when collected in cases in which county has paid the same, shall be paid to the county treasurer for the use of the county; and in other cases to the coroner. No fees shall be paid for an inquest when it is publicly known before the jury is summoned who caused the death of the deceased, or when the slayer has been arrested for the homicide; but in such case, if the immediate cause of the death is uncertain, a physician or surgeon may be summoned to make a post mortem examination, who shall give his opinion in writing as to the cause of the death, which must be returned by the coroner as inquests are returned by him, and such coroner, physician, or surgeon shall be entitled to the same fee and mileage, to be paid in the same manner as for attending an inquest; such fees as accrue to coroners for services rendered by him in discharging duties of sheriff, must be taxed, collected, and paid in the same manner that sheriff's fees for like services are taxed, collected and paid."

It will be observed that the statute above set out provides that fees for holding an inquest shall be paid out of the county treasury, "**when** in the opinion of the Court of County Commissioners or Board of Revenue the inquest should have been held"; thus placing the payment of inquest fees out of the county treasury, wholly within the discretion of the Commissioners Court.

Jefferson County v. Abernathy, 139 Ala. 264.

Said Section 3752, Code of Alabama, 1923, further provides; after the fees for holding an inquest shall have been certified and taxed as costs "when collected in cases in which the county has paid the same, shall be paid to the county treasurer for the use of the county; **and in other cases to the coroner.**" Thus clearly showing that in cases where the Commissioners Court or Board of Revenue, in the exercise of their discretion under the statute, declined or refused to allow the fees for holding an inquest to be paid out of the county treasury, the coroner and jurors were entitled to receive the same, when certified and taxed as costs and collected pursuant to the statute.

Jefferson County v. Abernathy, 139 Ala. 264.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 5, 1930.

Hon. R. T. Simpson, Jr.,
Circuit Solicitor,
Florence, Lauderdale County, Ala.

Justice of the Peace—one Justice of the Peace cannot pay costs of another Justice.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of July 3, 1930, in which you state that there are some court costs due a Justice of the Peace of Lauderdale County for a case which arose in his court prior to the time he terminated his official duty as a Justice of the Peace. There never has been, since his retirement from this office, a successor appointed or elected and hence it has been impossible for him to have his costs paid from the fine and forfeiture fund of his successor, since there is none.

You request my opinion:

Would it be permissible to have the magistrate in the adjoining beat pay him his costs, and if not how would you suggest that the matter be handled?

Answering your inquiry, I am of the opinion that there is no law authorizing a magistrate in one beat to pay the costs of another magistrate in an adjoining beat who has terminated his official connections.

The only legal authority for the payment of the costs of a Justice of the Peace in criminal cases where the defendant was acquitted, or shown to be insolvent and unable to pay after conviction, is found in Section 3850, Subsection 2 of the Code of Alabama, 1923. This subsection authorizes a Justice of the Peace to deduct from fines and forfeitures collected by him the amount due for his fees and those of the constable in cases in which the defendant was acquitted or insolvent and unable to pay after conviction, a sum not to exceed \$50.00 for any calendar month, and to pay the remainder of fines and forfeitures collected by him to the County Treasurer. There is nothing contained in Section 3850, supra, or in any other section of the Code which authorizes one Justice of the Peace to pay the costs of another Justice of the Peace.

Per contra, Section 3734 of the Code of Alabama, 1923, expressly provides that the law of costs must be deemed and held a penal law, and no fee must be taken but in cases expressly provided by law. The fees prescribed in this Code shall be the only fees that can be collected by any officer. It is perfectly plain from a reading of this Section that an officer making claim to any fee must be able to point to some clear and definite provision of the statute which authorizes him to make the charge or demand.

Troup v. Morgan County, 109 Ala. 162.

On June 6, 1929, I rendered an opinion to the Deputy Solicitor of Colbert County in which I held that a Justice of the Peace could not pay the costs due his predecessor in office from fines collected by him.

Opinion of Attorney General, Vol. 12, p. 44, (office edition).

If a successor to the office of Justice cannot pay from fines collected by him the costs of his predecessor, certainly no other justice of the peace could do so. I cannot make any suggestion as to how this matter can be handled in order that the Justice of the Peace mentioned can collect his costs.

He, who accepts public office, takes it cum onere and can receive only such salary as is authorized by law.

McElderry v. Abercrombie, 213 Ala. 289.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 5, 1930.

The Judge of Probate,
Vernon, Lamar County, Ala.

Road Duty: Employees of State Highway Department exempt from road duty while actually engaged in maintenance of highways.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of August 16, 1930, in which you request my opinion:

Should those who are employed by the maintenance department of the state highway department, and who are working on the state highways, say of Lamar County, be required to work the rural roads of the county or pay a commutation fee as others do?

Answering your inquiry, I am of opinion that the employees of the State Highway Department are not required to work the county roads while they are actually engaged in the construction, maintenance or repair of the state highways.

The pertinent part of Section 164 of the "Alabama Highway Code", being an Act approved August 23, 1927, reads as follows:

"All employes of the State Highway Department, who are actually engaged in the service of the State Highway Department in the construction, maintenance, or repair of the State Highways shall be exempt from road duty of their respective counties. Provided that such employes so engaged shall present a certificate from the foreman or the person in charge of the work at that period, stating the above reason for exemption, but nothing herein shall be construed as exempting the employes of the

State Highway Department, as required by law, to perform the required road duty within each annual period but to provide exemption for such person, when road duty notice is served upon him at a time when his services are especially required in an emergency, by the State Highway Department."

Under the above quoted Section of the Alabama Highway Code, it was clearly the legislative intent that the construction maintenance or repair of the State Highways should not be interrupted by requiring the employes of the State Highway Department to work the county roads while they were actually engaged in the construction, maintenance or repair of the State Highways. It will be observed that the statute provides for the exemption of State Highway employes from county road duty only during that time in which they are actually engaged in work on the State Highways. Such employees may be summoned for work on the county roads at any time that they are not actually engaged in work on the State Highways. If any such under the general law or local law of Lamar County they can be required to work the county roads of Lamar County at any time they are not actually engaged in work on the State Highways. If liable they must either work the county roads or pay the required commutation fee.

For your further information and guidance I am herewith enclosing copy of an opinion to the Judge of Probate of Lauderdale County dated December 5, 1929, which is directly in point.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Enc.

Sept. 5, 1930.

The Clerk of the Circuit Court,
Brewton, Escambia County, Alabama.

Habeas Corpus—How cost is paid when State appeals.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 6, 1930, in which you state that where the State takes an appeal in a Habeas Corpus proceeding and the State loses in the Court of Appeals how is the cost in such proceeding in the Court of Appeals paid.

It is my opinion that the cost in this matter is collected under the provision of an Act of the Legislature approved Feb. 18, 1927, (General Acts 1927, p. 45). You will note this Act is amending Section 4039, Code of Alabama, 1923, which refers to the Fine and Forfeiture Fund of the various counties of Alabama.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 6, 1930.

The State Superintendent of Education,
Montgomery, Alabama.

Schools—Proceeds of insurance not used to erect school building on plans and specifications not designated for state buildings.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of July 2, 1930. You state that in a number of instances local trustees are appealing to county boards of education to allow them to use the proceeds of insurance in reconstructing buildings with a view of using local plans and lower grades of material than are specified for state buildings. You state that there are two classes of buildings which should be taken into consideration—(1) those buildings that were originally constructed under state plans and specifications and on which the state contributed practically one-third of the funds used in the construction; (2) the older type buildings constructed by local communities and which after being erected were deeded to the state with a view of getting aid on repairs and equipment for the buildings.

You request my opinion:

Can the proceeds of insurance on the buildings referred to above be used in constructing buildings by local plans, and by the use of lower grades of material than are specified for state buildings?

In my opinion your question must be answered in the negative.

Section 36 of the School Code of 1927, provides that the State Board of Education shall adopt rules and regulations for the proper construction of school buildings.

Section 372 of the School Code of 1927, provides for applications for state aid.

After careful consideration of the various provisions of the School Code of 1927, relative to the erection of school buildings, it is my opinion that it would be illegal to use the proceeds of insurance in the manner mentioned above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 5, 1930.

The Judge of Probate,
Montgomery, Montgomery County, Ala.

Board of Revenue—cannot furnish Judge of Probate with Alabama Code of 1928 (Annotated).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 3, 1930, in which you request my opinion as to whether or not the Board of Revenue may authorize an expenditure of thirty-six dollars for the purchase of the Alabama Code of 1928 (Annotated) for the use of the probate office.

I am of the opinion that your question should be answered in the negative. Under Section 794, Code of Alabama, 1923, the Secretary of State is required to furnish copies of the Code of Alabama, 1923, Acts, etc., to the Judge of Probate and other county officials.

Section 9605, Code of Alabama, 1923, as amended by an Act approved Sept. 6, 1927 (General Acts 1927, p. 693), provides that the county officials enumerated therein shall be allowed reasonable expenses, for suitable books, stationery, etc., to be paid for by the county, on the approval of the Court of County Commissioners, Board of Revenue or other like governing body.

Although the Alabama Code of 1928 may be considered a suitable book, yet the Code of Alabama, 1923, and subsequent Acts are furnished the Judge of Probate by the Secretary of State free of charge. These books are one and the same with the exception of the more favorable index and additional annotations found in the Alabama Code of 1928 (Annotated).

This additional expenditure would be one for convenience rather than necessity. The law provides for the expenditure of public funds for necessities only.

Opinions of Attorney General, Book 16, p. 25, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 6, 1930.

The Judge of Probate,
Abbeville, Henry County, Alabama.

Counties—Not liable for money deposited by road foreman in bank that became insolvent.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 11, 1930, in which you state as follows:

The road foreman collected county warrants and deposited the proceeds to his credit in a bank against which deposit he issued checks for the payment of items on his pay roll. All the checks which he personally issued were paid except one, which reached the bank after it had closed its doors, and was put in the hands of the receiver for liquidation. Said road foreman is under bond for the faithful discharge of all duties required of him, one of which is the payment of such claims, when furnished with money, as is contained on his pay roll.

You request my opinion as to whether or not the county would be liable for the payment of the above mentioned check, that reached the bank after it had closed its doors.

I am of the opinion that your question should be answered in the negative. When the warrant issued to the road foreman by the county was cashed, the county's liability ceased. The money was then in the hands of the road foreman to pay the items on his pay roll. He or his bondsmen were then liable for said funds until a legal disposition of same was made. The money was deposited in the bank to the personal account of the road foreman, and the county then had no interest in same. In the event of a misappropriation or loss of said funds, the county's recourse was against the road foreman or his bondsmen.

In order for the road foreman to have secured himself against loss of deposit in said bank, he should have made said bank secure said deposit.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 8, 1930.

Superintendent of Banks,
CAPITOL.

Section 6339, Code of Alabama, 1923—Construction of—Banking—Commercial papers.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of May 28th together with enclosures from the Vina Banking Company in which it is stated that said bank receives an invoice

and freight bill with check in settlement of account with lumber concerns.

You request my opinion:

1. Can a bank under Section 6339 of the Code of Alabama, 1923, lend any person, firm, or corporation more than 20% of its capital, unimpaired surplus and undivided profits? Where such loans exceed 10% of the capital, unimpaired surplus and undivided profits, must such loan be secured by collateral or other ample security?

2. Is the invoice and bill of lading attached in its present form commercial paper within the meaning of Section 6339 of the Code, *supra*?

In answer to your first question, I am of the opinion that a bank should not lend any one person, firm, or corporation more than 20% of its capital, unimpaired surplus and undivided profits unless such loan shall be secured by collateral or other ample security; but such bank may buy from or discount for any person, firm or corporation, bills of exchange drawn in good faith against actually existing values, commercial or public paper actually owned by the person negotiating the same and such excess loans must be approved in writing by a majority of the Board of Directors or Loan Committee, or authorized at a meeting of the Board of Directors or Loan Committee evidenced by properly recorded minutes of such meeting duly signed by the chairman and secretary. However, the limit fixed shall not apply to loans fully secured by bonds or certificates of indebtedness of the United States or State of Alabama or of the several counties or municipalities thereof.

Section 6339, Code of Alabama, 1923.

In answer to your second question, I am of the opinion that the invoice and bill of lading submitted by the Vina Banking Company cannot be considered commercial paper within the meaning of Section 9829 of the Code of Alabama, 1923, nor can it be considered commercial paper within the meaning of Section 6339 of the Code of Alabama, *supra*.

It is obvious that instruments to be negotiable must conform to chapter 321, Article 1 of the Code of Alabama, 1923. It appears that the enclosed invoice and bill of lading has not been assigned to the Vina Banking Company. A "bill of lading" represents the goods described in it. Bills of lading by the law merchant are representatives of the property for which they have been given and the endorsement and delivery of a bill transfers the property from the vendor to the vendee. At common law a "bill of lading" is a muniment of title to the goods or property therein specified. It is a symbol or representative of the goods and when properly endorsed and delivered with the intention of passing the title to them is symbolic or constructive delivery of the goods and when assigned the carrier having notice the assignment becomes bound to deliver the goods to the assignee.

Ark. S. R. Co. vs. German National Bank, 77 Ark. 482.
Great So. R. R. Co. vs. Norris, 167 Ala. 311.

From the statement of the Vina Banking Company it appears that they consider it good business in the instant case to handle the transactions with the lumber company mentioned. However, it is a matter of common knowledge that all lumber concerns could not in case a shipment was turned down pay the Bank the advance so made. It necessarily follows that not only the Vina Banking Company but all State Banks doing business or chartered by the State of Alabama must comply in every particular with Section 6339, Code of Alabama, supra, and in case of a violation thereof, it is the duty of the Superintendent of Banks to order any loan in excess of the amount fixed by said Section, supra, reduced to the legal limit or the excess charged to profit and loss provided in his opinion such loans are not properly secured and from the facts submitted by you the loan or advance made by the Vina Banking Company to the lumber concern in question is not properly secured within the meaning of said Section of the Code.

I am returning to you the enclosures.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 8, 1930.

The Adjutant General,
CAPITOL.

Car operated by Alabama National Guard in connection with the business of this organization in case of damage to person or property cannot be chargeable by suit to the State of Alabama nor the Alabama National Guard or any Division thereof.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 9th, 1930, in which you state that the Headquarters Troop 23rd Cavalry Division, Alabama National Guard owns a small Chevrolet truck, which is used in hauling freight to and from the Armory, also used at summer encampments for hauling all supplies. This truck is also used for other business that might be necessary by the caretakers within the business district of Birmingham.

You request my opinion:

In case of damage to persons or property by the operation of this truck as stated above, who would be liable for damages?

Certainly not the State of Alabama, nor the National Guard nor Troop 23rd Cavalry Division of Alabama National Guard. The Constitution of Alabama, 1901, Section 14 reads as follows:

"Sec. 14. That the State of Alabama shall never be made a defendant in any court of law or equity."

Also see *State v. Clements*, 117 So. 296.

However, the individual operating the truck, if he does so in a negligent way without regard to the rights and safety of others, and by such act a person or property is damaged, it is my opinion he individually would be liable.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 8, 1930.

The Judge of Probate,
Gadsden, Etowah County, Alabama.

Elections—County liable for payment for publication of list of qualified electors.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 14, 1930, in which you request my opinion as follows:

1st. Is the Board of Revenue required or authorized to pay for the publication of the list of qualified electors in a newspaper out of the general funds of the county?

2nd. Is there any limit of price which the newspaper may charge for this service provided by law?

In answer to your first inquiry, I am of the opinion that the county is required to pay for the publication of the list of qualified voters out of the general funds of the County. It is the duty of the Judge of Probate to publish the list of the names of the qualified voters of the County.

Section 387, Acts of 1927, p. 275.

Opinions of Attorney General, Biennial Report 1926-1928, p. 490.

Section 496, Code of Alabama, 1923, provides as follows:

"496. Blank forms and stationery for election.—The judge of probate for each county shall have printed, at the expense of the county, ballots, blank poll lists, certificates of results, oaths, and any other stationery or blank forms necessary in the conduct of election. The judge of probate shall also superintend and insure the delivery by the sheriff to the inspectors of the election of the ballots, blank poll lists, certificates of results, oaths and other stationery or blank forms necessary in the conduct of the elections."

The decisions of the Supreme Court are to the effect that the county is liable for only those claims which the law imposes or authorizes to be contracted.

Ensley Motor Car Company v. O'Rear, 196 Ala. 481, cases cited therein.

Opinion of Attorney General, Biennial Report, 1922-1924, p. 123.

In view of the above, I am of the opinion that the County is liable for the expense of publishing the list of qualified voters, to be paid out of the general funds of the County.

But there should be only one publication of the poll list every two years, i.e., between April 15th and May 1st of even years. Additional names may be added in a second publication, but said second publication shall contain only the names so added.

Section 387, Code of Alabama, 1923, as amended by an Act of August 20, 1927, (Acts 1927, p. 224)

In answer to your second inquiry, I am of the opinion that the price which a newspaper may charge for publishing the list of qualified electors shall not exceed one and one-half cents per word.

Section 9262, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 9, 1930.

The Judge of Probate,
Moulton, Lawrence County, Alabama.

Judge of Probate: Money in hands of Judge of Probate who dies while in office must be paid over to his successor.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 29, 1930, in which you state that the Probate Judge of your County died some time ago and that you were appointed to fill the vacancy. You also state that there is some money which the former Probate Judge had deposited in a bank to the credit of the Probate Judge of Lawrence County. This money belongs to certain estates and you state that you are now ready to pay this money out to the heirs.

You request my opinion:

Have I the authority as Probate Judge to check on these funds as Probate Judge in paying it out to the heirs?

You note that under Section 9594, Code of Alabama, 1923, the Chief Clerk in the Probate Office in case of the death of the Probate Judge of any County, becomes the acting Probate Judge and is such until a successor to the Probate Judge is appointed and when a Probate Judge is appointed it

becomes the duty of the Clerk to pay over to the Probate Judge all monies in his hands or in the hands of the former Probate Judge at the time of his death. The part of Section 9594, *supra*, which deals with this matter is as follows:

"If such chief clerk shall fail or refuse on demand to deliver all the books, papers, property, and money belonging or appertaining to such office, to the lawfully qualified successor of the judge of probate, as may be proceeded against under the provisions of this Code to compel the delivery of books, papers, property, and money by public officers to successors."

Now when this is done and the money is paid over to you as the successor of the deceased Probate Judge, then of course you are liable for same on your official bond and you can proceed to dispose of the same as Judge of Probate checking the same out in the payment of any lawful claims that may be against it.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 10, 1930.

Commissioner of Agriculture and Industries,
CAPITOL.

Agricultural Code, Article 17, Sections 139 and 152. Duty to place "filler" on registration forms and on tags and labels of container of fertilizers.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of July 24, 1930.

You request my opinion:

Whether under Sections 139 and 152 of the Agricultural Code of 1927, the Department of Agriculture and Industries within the law in requiring the term "filler" to be placed on both the registration and the tag or label required by law to be placed upon each bag or other container of fertilizer material offered for sale in Alabama.

Section 139 of Article 17 of the Agricultural Code of 1927, which refers to registration of fertilizers and fertilizer materials, reads as follows:

"Registration of Fertilizer Dealers Required.—All manufacturers, co-operatives, or importers of commercial fertilizers, and fertilizer materials to be used in the manufacture of the same, who may desire to sell in Alabama such fertilizers or fertilizer materials, shall first file, or register, with the Commissioner upon registration forms furnished by the said Commissioner, the name and address of the manufacturer or other

person guaranteeing same; also the name of each brand of fertilizer, fertilizer material, or chemical which they may desire to sell in Alabama either by themselves or their agents, together with the guaranteed analysis thereof and the sources and amounts within ten per cent of each material from which the phosphoric acid, nitrogen, potash and filler are derived; provided that the materials of nitrogen may be grouped into organic and inorganic sources. The term "filler" when used in this Article shall be understood to mean any foreign or "make-weight" material used in acid phosphate or in the manufacture of any mixed fertilizer."

Section 152 of Article 17 of the Agricultural Code of 1927, which refers to the placing of tags or labels upon bags or containers of fertilizers or fertilizer materials, reads as follows:

"152. Branding of Fertilizer Container.—Every bag, barrel or package of commercial fertilizers sold or distributed within this state, shall have affixed thereto a tag or label, containing a legible and plainly printed statement in the English language, clearly and truly certifying the following information in the order indicated. (1) Net weight of each bag, barrel or package in pounds; (2) Brand name or trade mark; (3) Guaranteed analysis, giving (a) the minimum percentage of available phosphoric acid, and the sources and within ten per cent of the amount of each source of available phosphoric acid, (b) the minimum percentage of nitrogen, and the sources and within ten per cent of the amount of the source in the form of organic materials (such as fish scrap, blood and tankage), and the source and within ten per cent of the amount of the source in the form of inorganic material, such as nitrate of soda and sulphate of ammonia), (c) the minimum percentage of potash and the sources and within ten per cent of the amount of each source of potash. (4) The source and within ten per cent of the amount of filler; (5) total pounds of available plant food; (6) name of manufacturer, cooperative or importer."

It is plainly the purpose of the statutes to provide that the manufacturers, cooperative or importers of commercial fertilizers and fertilizer materials in this State shall apprise the official, purchasing and general public as to each chemical or material sold or offered for sale in Alabama. It has been held that any sale of commercial fertilizer is void unless each sack or container thereof is tagged as required by statute at the time of sale.

Kirby vs. Huntsville F. & M. Co., 105 Ala. 529, 17 So. 38.

Clark's Cove Guano Co. vs. Bowling, 85 Ala. 142.

Brown & Co. vs. Adair & McCarty Bros. 104 Ala. 652, 16 So. 439.

Gadsden Fert. Co. vs. Wiles, 178 Ala. 459, 59 So. 582.

State vs. Lamar, 178 Ala. 77, 59 So. 473.

Upon consideration of the foregoing statutes and opinions, it is my opinion that the Department of Agriculture is not only within the law, but within its duty to the purchasing public, in requiring the term "filler" to be placed

on both the registration and the tag or label of fertilizer or fertilizer material offered for sale in this state.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 11, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

1. There is now no provision of law for refunding from the State Treasury an over-payment by a foreign corporation for permit paid under the provisions of Section 42 of Act 163, approved July 22, 1927, through error on the part of the corporation as to the amount of capital employed by it in this state.
2. The Legislature may provide, by statute, for such refunding.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of September 8, 1930, is acknowledged. You make the following statement of facts:

A foreign corporation, under the provisions of Section 42 of Act No. 163 (Acts 1923, pages 171, 172) made application to the Secretary of State for a permit. The agent of the corporation applying for the permit represented to the Secretary of State that the capital employed by said corporation in this State was in excess of fifty thousand dollars, and, thereupon paid to the Secretary of State the fee of one hundred dollars as provided by said Section 42. The Secretary of State, in accordance with the requirement of said Section 42, paid said money into the State Treasury.

The said corporation now finds that its agent made an error in his statement of the amount of capital employed by it in this State; that the amount was less than one thousand dollars, and that the permit fee should have been five dollars.

You ask my opinion as follows:

- 1st. Is there any provision of law authorizing the refund of the over-payment to said corporation from the State Treasury?
- 2nd. Could the amount so overpaid be refunded by an Act of the Legislature?

In reply to your first question will say that the facts as stated show that the one hundred dollars paid for the permits was duly and legally paid by the Secretary of State into the State Treasury. In my opinion, there is no provision of law by which such refund can be made from the Treasury. Section 72 of the Constitution of the State provides:

"No money shall be paid out of the State Treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof; and a regular statement and account of receipts and expenditures of all public moneys shall be published annually, in such manner as may be by law directed."

From the foregoing, it is clear that without an Act of the Legislature authorizing it, such money cannot be refunded from the State Treasury.

In answer to your second question, will say that I know of no reason why the Legislature, if it sees fit to do so, may not provide, by statute, for the refunding of such an overpayment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 12, 1930.

Clerk of the Circuit Court,
Scottsboro, Jackson County, Ala.

Fines—generally go to county in which indictment was found or prosecution commenced.

Fees—Salaried solicitor's fees go to State Treasury.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 25, 1930, in which you request my opinion as to what disposition you, as clerk of the circuit court, are to make of fines, solicitor's fees and stenographer's fees in the circuit court.

I am of the opinion that all fines and forfeitures shall go to the county in which the indictment was found or prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the State for the use of the particular county.

Section 4038, Code of Alabama, 1923.

I am of the opinion that all fees which may be by law taxed and collected as solicitors fees against defendants on convictions secured by a solicitor who is paid a salary by the state belong to the state, and, when collected must be paid into the state treasury.

Section 5511, Code of Alabama, 1923.

Also wish to call your attention to Sections 5512 to 5521, Code of Alabama, 1923.

I am of the opinion that stenographer's fees taxed and collected as a part of the costs in a criminal case, go to the county treasury of the county in which the case is tried.

Section 6738, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 15, 1930.

The Judge of Probate,
Ashland, Clay County, Ala.

Elections—Absentee votes—necessity for application by elector—
General elections.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 10 in which you request my opinion as to the course you should pursue relative to absentee ballots in the following cases:

1. Where someone asks that a ballot be sent to a voter and no assurance that the voter himself has requested such action and no written request furnished.
2. Where someone brings a written request signed by himself for the voter, without the voter's request.
3. Where written application is filed on a blank request with the voter's name signed to the same by the applicant and not by the voter but when I am assured by the applicant that the voter requested him to sign the voter's name to the same.

In answer to your first question will state that you should not honor the application.

In answer to your second question will state that you should not honor the application.

In answer to your third question will state that the application is a nullity.

I invite your attention to Section 408, Code of Alabama, 1923, which reads as follows:

"408. Ballots furnished by Probate Judge to Voter.—The judge of probate of any county in this state, upon application of any qualified voter of his county, not more than thirty days nor less than five days before any general, special or municipal election is to be held in this state, shall deliver or forward immediately upon request to such applicant, an official ballot and printed form of oath as provided for in sections 407 and 410 of this Code for use in such election, with an envelope addressed to the probate judge of the county in which said absent or contemplated absent voter is a qualified elector."

The above is the law relative to your furnishing absentee ballots in **general** elections. You cannot furnish an absentee ballot more than thirty days nor less than five days **before** the **general** election in which the ballot is to be cast. You cannot furnish absentee ballots at any time except upon the written request of the elector **who is to cast it**. The only persons to whom they should be furnished are those qualified electors referred to in Section 405, Code of Alabama, 1923. When you furnish them you should comply with Section 411, Code of Alabama, 1923, as to preparation of lists, and unless Section 411, *supra*, is complied with, the ballots are no good. The lists of applicants and of absent ballots cast are open to inspection of the public.

Upon careful consideration of Article 4, Chapter 19, Code of Alabama, 1923 (Vol. 1, p. 602, et seq.), I am of the opinion that, before you forward to the applicant an absentee ballot or deliver same to him, you should satisfy yourself beyond a reasonable doubt that the application is the genuine application **of the elector who desires to cast it**, and the ballot must be delivered to the applicant in person or be forwarded to him by mail in the manner prescribed by law, and unless this is done the law has not been complied with.

Opinions Attorney General, 1926-28, p. 518.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 17, 1930.

Hon. L. A. Kirkland,
Justice of the Peace,

Webb, Houston County, Ala.

Mayor—Qualifications of—A resident citizen and qualified elector of a town, residing within corporate limits, eligible to the office of mayor.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of August 27, 1930.

You request my opinion:

Can a citizen be a candidate for mayor of a town of less than two thousand inhabitants if he owns no real or personal property, and pays no taxes except poll tax, provided he lives within the corporate limits?

The answer to your question is in the affirmative. It is not necessary for a resident of a town to own real and personal property in order to become its mayor. You are wrong in your contention that it is necessary for him to own real and personal property. If he is a resident of the town and pays poll taxes, he is entitled to become a candidate for mayor.

Section 1761 of the Code of Alabama, 1923, reads as follows:

"Mayor and council; qualifications; eligibility of.—Every mayor, councilman and officer elected by the whole electorate of the city or town shall be a resident and qualified elector of the city or town in which he shall have been elected, and shall reside within the limits of the city or town during his term of office. The councilmen shall be qualified electors of said city or town, residing within the limits of the ward from which they shall have been elected, and shall reside within the limits of said ward during the term of his office."

You will note from a reading of the above quoted section of the Code that the eligibility of a candidate for mayor depends simply upon the fact of whether or not he is a resident and qualified elector of the town and resides within the incorporate limits.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 18, 1930.

The Mayor,
Clanton, Chilton County, Ala.
Corrupt practice Act—as to municipal elections.
Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of September 10, 1930.

You wish my opinion:

1. Whether the enactment of the State Legislature of Alabama known as the Corrupt Practice Act applies to municipal elections.
2. Where a statement of expenditures of candidates in municipal elections should be filled.

Section 1880, Code of Alabama, 1928, Annotated, reads as follows:

"1880.—Municipal election held under general election laws: officers of—Elections in cities and towns of this state shall be conducted according to the **general** election laws, **except as otherwise provided in this chapter**. The council shall appoint three inspectors, two clerks and one returning officer for each polling place, and may direct one or more polling places to be opened in each ward. It shall be the duty of the mayor and clerk to provide for the opening of said polls and to give at least ten days' notice by publication in a newspaper published in such city or town, if any, or by posting such notice in three public places in the municipality. Such notice shall give the names of the election officers at each polling place, and the location of the polling places. If an inspector is absent at the time of opening the polls, those present may appoint a person to fill the vacancy. If all are absent, any three qualified electors

of the municipality and of the ward may act as inspectors and appoint two clerks and a returning officer to fill the vacancy, if any."

A study of the chapter of the Code of Alabama in which this section appears presents nothing that in my opinion would obstruct a natural application of the **general** election laws as regards the matter of your inquiry.

Section 586, Code of Alabama, 1923, referred to the graduating and fixing of the campaign expenditures of candidates, reads in part:

" * * * by a candidate for any other public office to be voted for by the qualified electors of a county, **city, town or village**, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding State election, or at the last preceding State primary, if more votes were cast in such primary than in such election, shall be five thousands or less, the sum of one thousand dollars; if the total number of votes cast therein at such preceding State election or at such last preceding State primary, if it be higher than the last preceding State election, be in excess of five thousand, the sum of ten dollars for each one hundred in excess of such number may be added to the amounts above specified."

Section 583, Code of Alabama, 1923, definitely states that any person who has announced to the public that he is a candidate for election or nomination to any office or popular or party vote is a candidate.

Section 592, Code of Alabama, 1923, provides that statement of campaign expenditures shall be filed and stipulates in what office, in the case of a candidate for municipal office, the office of the judge of probate of his county.

An official position with a city in Alabama is an office under the laws of Alabama.

Opinions Attorney General, Book 9, p. 146; (Office Edition).

Mayor of a municipality is an office of profit in this State.

Montgomery v. State ex rel. Enslen, 107 Ala. 372.

Thus it is my opinion:

1. The enactment of the State Legislature of Alabama known as the Corrupt Practice Act applies to municipal elections.

2. A statement of expenditures of candidates in municipal elections should be filed in the office of the Judge of Probate of the county in which the candidate resides.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 18, 1930.

The Commissioner,
Department of Game and Fisheries,
CAPITOL.

Game Laws—What constitutes a violation of Section 4191, Code of Alabama, 1923, which section has reference to baited fields for doves and other birds.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 8, 1930, in which you quote Section 4191, Code of Alabama, 1923, which is as follows:

"4191. Trap, snare, dead fall, baiting, etc., prohibited.—Any person who shall at any time make use of any pitfall, deadfall, baited field, cage, snare, trap, net, salt lick, pen, baited hook, scaffold, poison, chemicals, or explosives, for the purpose of injuring, capturing or killing birds or animals protected by the game laws of this state, except as otherwise expressly provided, shall be guilty of a misdemeanor, and, on conviction, shall be punished by a fine of not less than twenty-five dollars nor more than fifty dollars for each offense."

You request my opinion:

Advise me whether, under section quoted above, a person who makes use of a baited field for the purpose of killing doves, whether he has personal knowledge of said field being baited, violates the law and becomes subject to the penalty provided therefor when he does shoot over or make use of a baited field for the purpose of killing doves or other birds?

In my opinion, he does not. Before one can be guilty of a criminal offense of this character he must have knowledge of the criminal element which makes it an offense. The fact that the place where the shooting is done was in fact what is commonly known as a "baited field," if he had no knowledge of it being such, and had not been put on notice that he was shooting on a baited field, no criminal liability could attach. In other words, there must be a wrongful act and a willful intent concurring to constitute a crime.

White v. State, 44 Ala. 409;
Rasberry v. State, 50 Ala. 150;
Gordon v. State, 52 Ala. 308;
Davis v. State, 68 Ala. 58.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 18, 1930

The Judge of Probate,
Ft. Payne, DeKalb County, Ala.

Peddlers—Certificate of license exemption issued by county health officer and not county board of health.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of April 2, 1930. In it you state that the county board of health of your county has recently made a ruling that before the county health officer can issue a certificate of disability for a person to peddle, that person must first be examined by the county board of health.

You request my opinion:

Can the county health officer issue such a certificate of disability without the applicant therefor first being examined by the county board of health?

I am of the opinion that your question should be answered in the affirmative.

The last sentence of Schedule 80 of Section 361 of an Act approved Sept. 15, 1919, (General Acts 1919, p. 425), provides for the exemption of disabled persons for peddler's license as follows:

"Provided that no peddler's license shall be required of Union and Confederate veterans of the Civil War, nor of persons totally blind, nor of persons who are physically disabled to do manual labor, **who shall obtain a certificate from the county health officer** as to such disability, etc."

I construe the above section to mean that the applicant should be subject to only one examination, that of the county health officer.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 18, 1930.

The Sheriff,
Selma, Dallas County, Ala.

Absentee ballots may be cast in special primary election.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 3, 1930, in which you state that Dallas County is to hold a special primary election on October 3, 1930, for the purpose of nominating a tax assessor.

You request my opinion:

Can a person who is a qualified elector and who is absent from the county on business, vote an absentee ballot in such election?

It is my opinion he can under Section 405, Code of Alabama, 1923, which is as follows:

"405. Absent voter defined—Any qualified elector of this state, whose name at the time of any general, **special** or municipal election appears on the official list of qualified voters in any county in the State of Alabama, and who may at any general, **special** or municipal election hereafter held pursuant to law in this state, by reason of his regular business and in the performance of his regular business and in the performance of his regular duties, be absent from the state or from the county in which he is a qualified elector, may vote in such general, **special** or municipal election in the manner and under the regulations hereinafter prescribed with like effect as if he were casting his vote in person at his regular and proper polling place."

You will note that the special elections are provided for in the above quoted Section.

See also opinions of Attorney General, Biennial Report, 1926-28, pp. 518, 495, 671.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 18, 1930.

Hon. M. W. Foreman,
Chairman, Democratic Executive Committee,
Springville, St. Clair County, Alabama.

Elections—Absentee ballots in Primary Elections—how obtainable.

Opinion by the Attorney General.

Dear Sir:

I have your letter of July 18, 1930, in which you state that you desire a ruling from this office in regard to absent voters receiving ballots from the probate judge. You request that I advise you if an absentee voter signs the proper affidavit which is required by law and at the same time write a note to the probate judge requesting him to send him a ballot by a certain person whom he has requested to bring it, is the probate judge required to deliver the ballot to the person requested to deliver it by the voter, or is it the duty of the probate judge to mail this ballot direct to the voter. You invite attention to Section 680, Code of Alabama, 1923.

Under separate cover I am sending you a copy of the Biennial Report of the Attorney General for 1926-1928, and invite your attention to an opinion

rendered by this office on May 5, 1928, to the Chairman of the County Democratic Executive Committee of Shelby County (Opinions Attorney General, 1926-1928, p. 518). You will observe that this office has heretofore held that the application by the absentee voter must be **in writing, signed by him** and in such manner and form that it may be **filed** by the probate Judge when received.

Specifically answering your question, I am of the opinion that, in primary elections, **only** the qualified elector whose name appears on the official list of qualified voters of the county, and who at the time of the holding of the primary election is absent from the county in which he is a qualified elector, by reason of his regular business and in the performance of his regular duties, may cast an absentee ballot upon application for the form and in the manner prescribed by Article 3 of Chapter 20, Code of Alabama, 1923, (Sections 677-684, inclusive.) In order for the elector to obtain an absentee ballot the provisions of Section 680, Code of Alabama, 1923, must be strictly followed. The application for same must be made **by the person who desires to cast it**. It must be made to the probate judge of the county in which he is a qualified elector. It must be made not more than thirty days nor less than five days before the primary election is to be held in which he desires to cast it. The application must be in writing (Opinions Attorney General, 1926-1928, p. 518). The application must be **signed** by the qualified elector himself who desires to cast the ballot. Application must be "**filed**" with the probate judge (Sections 680, 683, Code of Alabama, 1923). Upon receipt of the application in the form mentioned, the probate judge must immediately deliver to the applicant **in person** or forward to him **by mail** in the manner prescribed, an official ballot and printed form of oath as provided for in Section 679. (See also Section 682, Code of Alabama, 1923), together with an envelope addressed to the Chairman of the County Executive Committee, or to the secretary thereof, as the case may be under Section 680, Code of Alabama, 1923, or to the probate judge, in case of a vacancy in the chairmanship or secretaryship, etc., as provided in said Section. All the provisions of Article 3, Chapter 20, Code of Alabama, 1923, *supra*, must be strictly followed by the probate judge as to filing of the applications and as to preparation of the list of applicants. The list of applicants for absentee ballots is open to inspection by the public at all times. The chairman or other authority, as provided by Section 679 and 680 of the Code, whose duty it is to receive and deliver said ballots to the respective polling places "shall make, as the envelopes containing the ballots are received, a list showing the dates when received and the name of the absent voters, with their respective precincts in which they are respectively qualified to vote." This list, so made by the chairman of the county executive committee, is open to inspection by the public at all times, and on the day of election must be delivered by the authority making it to the probate judge of the county in which instance said authority's duties are performed. The list prepared by the chairman, as above mentioned, must be preserved by the probate judge for sixty days after the election just prior to which same is made. (Section 683, Code of Alabama, 1923). In view of all the provisions of the Code relative to absentee voters in **primary** elections, I believe it is clear that it was never the intention of the Legislature that an absentee ballot

should be delivered to anyone other than the elector who is to cast it. It is also clear that, before the probate judge can deliver an absentee ballot to an applicant in person or forward it to him by mail, the probate judge must be satisfied beyond a reasonable doubt that the the application is genuine.

You will understand that this opinion has reference only to **primary** elections, and not to general elections.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 18, 1930.

CCM:J

The Chairman,
State Tax Commission,
CAPITOL.

Motor vehicles—Transfer of tags—Fees of Probate Judge.

Opinion by the Attorney General.

Dear Sir:

I am in receipt of a letter dated June 21st from the Probate Judge of Dallas County, Alabama, calling attention to an opinion by this office rendered to the State Tax Commission under date of June 18, 1929, wherein we hold that the Probate Judge is not entitled to a fee for issuing a certificate of transfer in such cases. The Probate Judge asked for a reconsideration of this opinion in the light of Section 7285, Code of Alabama, 1923. I have reconsidered the opinion and see no reason why our ruling of June 18, 1929, should be changed, and, therefore, adhere to it.

The Probate Judge is not entitled to a fee for issuing a certificate of transfer of automobile tags.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 18, 1930.

The Secretary,
State Bridge Corporation,
CAPITOL.

Alabama State Bridge Corporation—Tolls—Right to enforce payment.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of recent date in which you state a certain party refused to pay toll on one of your bridges and continued in this refusal until

he had blocked traffic to such an extent that the toll collector was forced to let him proceed without paying the toll. You request my opinion:

1. Has the Alabama State Bridge Corporation the right to collect tolls and enforce the payment of the same?

2. Should a user of the bridges refuse to pay the toll, although admitting that he is financially able to pay, has the toll collector the right to insist on him not passing beyond the toll collector's booth? (The toll collector's booth being the property of the corporation.)

3. On being stopped by the toll collector should a user wilfully block traffic by his continued refusal to pay the toll, is he guilty of violating the law against wilfully blocking traffic and is he guilty of trespass?

The answer to your first question is in the affirmative. The authority for the collection of tolls is found in an Act authorizing the incorporation of the Alabama State Bridge Corporation, approved August 31, 1927, (Acts 1927, p.p. 278, 281). That part of the Act which is pertinent to your inquiry reads as follows:

"As soon as any of the bridges herein authorized are put in operation, the corporation shall arrange for and supervise the collection of tolls for the use of said bridges, which shall be at such rates as the corporation may fix."

The Alabama State Bridge Corporation, built, paid for and owns the bridge, subject to State and Federal regulations presented by statutes of the State and Acts of Congress of the United States. The toll charged for the use of the bridges is not a tax, but is merely reasonable compensation for the use of the bridge in crossing the river, and the Bridge Corporation, as shown above, has the right to charge a reasonable toll for the use of the bridge.

Opinions Attorney General, Book 17, p. 164, (Office Edition).

The answer to your second question is in the affirmative. No user of the bridge should be allowed to pass the toll collector's booth without the payment of the toll fixed by the Alabama State Bridge Corporation.

Answering your third inquiry, any user of the bridge required to pay the toll, who refuses to pay the same, and who by such wilful refusal, blocks the traffic, should be proceeded against under the provisions of Section 6455, Code of Alabama, 1923, which reads as follows:

"Section 6455. Injuring Bridge or Causeway; Passing Round Toll; Penalty:—If any person breaks or injures any gate to a toll bridge or causeway, or obstructs, injures, or destroys such bridge or causeway, or passes round or under the same, with intent to avoid the payment of toll, such person forfeits to the owner ten dollars, for each of such acts, and is also liable to an action for damages."

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 19, 1930.

The Chairman,
State Tax Commission,
CAPITOL.

Licenses—Baggage or parcel lockers operated with coin device not subject to nickel-in-the-slot license tax.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 4, 1930, in which you request my opinion as follows:

Is a license required of baggage or parcel lockers, used for the purpose of storing baggage and operated with coin slot devices, under the nickel-in-the-slot license schedule, i. e., Schedule 129 of Section 334 of **Revenue Law of 1929 (Acts 1919, p. 282, Section 361, Schedule 75)?**

I am of the opinion that your question should be answered in the negative.

Slot devices on hotel toilets are not subject to license tax under the nickel-in-the-slot license schedule.

State v. New Florence Operating Co., 95 So. 913;
Opinions of Attorney General, Book 9, p. 61 (Office Edition).

Pay telephone stations using slot devices are not subject to license tax under said schedule.

Biennial Report of Attorney General, 1926-28, p. 502.

Reasoning by analogy, I am of the opinion that, the device in question, is not a slot machine within the contemplation of the nickel-in-the-slot license schedule. Such a device, in my opinion, is not a slot machine such as the Legislature had in mind when said schedule was enacted, although same may or may not be operated for profit.

Statutes providing for taxation are to be construed strictly against the State and in favor of the taxpayer, and the burden and liability which they impose are to be kept within the strict letter of the law, and not extended beyond its clear term by any inference, implication or analogy.

State v. New Florence Operating Co. (Supra);
37 Cyc. 786, and authorities cited.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 19, 1930.

The Tax Assessor,
Scottsboro, Jackson County, Ala.

When person otherwise qualified to vote fails to pay his poll taxes by Feb. 1 of any year, he thereby bars himself from voting at any election held prior to Feb. 2, of succeeding year—Persons 45 years of age must pay all delinquent poll taxes before voting.

Opinion by Assistant Attorney General Brassell.

Dear Sir.

I have your letter of September 10, 1930. You request my opinion on the following:

1. Can a citizen who has duly registered but in arrears with his poll taxes pay such poll taxes and participate in the general election to be held November 4, 1930?

2. Is a person a legal voter at forty-five years of age regardless of whether or not such a person has regularly paid poll taxes before attaining that age,

In answer to your first question, I am of the opinion that persons who are duly registered but are delinquent in the payment of poll taxes cannot pay their poll taxes between the first day of October, 1930, and February 1, 1931, and **vote as an elector** in the general election to be held November 4, 1930.

Section 178, Constitution 1901;
Graves v. Eubanks, 205 Ala. 174;
Opinions Attorney General, Book 15, (Office Edition, p. 80);
Biennial Report of Attorney General, 1926-28, p. 566;
Biennial Report of Attorney General, 1926-28, p. 632;
Code of Alabama, 1923, Section 361.

In answer to your second question, I am of the opinion that a person **forty-five years of age** is not a qualified elector unless such person has registered and paid all poll taxes due at the age of forty-five years.

Sections 178, 180 and 186, Constitution of Alabama, 1901;
Code of Alabama, 1923, Sec. 361, *supra*;
Biennial Report of Attorney General, 1926-28, pp. 405, 344, 337 and 566;
Code of Alabama, 1923, Section 3906;
Code of Alabama, 1923, **Section 3907.**

Under your first question, one who is delinquent in the payment of poll taxes cannot participate in the general election to be held on November 4, 1930, because Section 178, of the Constitution of 1901 provides that, an elector "shall have on or before the first day of February **next preceding** the date of the election at which he offers to vote, paid such poll taxes before he can vote." That Section of the Constitution is mandatory and reads as follows:

"Section 178. To entitle a person to vote at any election by the people, he shall have resided in the state at least two years, in the county one year, and in the precinct or ward three months immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year, provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town or city, shall have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal."

The words "next preceding the date of the election at which he offers to vote" have been judicially defined, i.e., the word "next" means in the nearest time. The words "next preceding" mean immediately preceding the date of the election at which he offers to vote.

Vol. 5 Words and Phrases, Third Series, p. 448;

Vol. 3 Words and Phrases, Second Series, p. 611.

In an opinion addressed to the judge of probate of Autauga County, October 19, 1929, (Opinions Attorney General, Book 15, Office Edition, p. 80), I held that it was clear from the reading of Section 178 of the Constitution "that when a person fails to pay all poll taxes due him by February 1 of any year, he is thereby barred from voting at any election held prior to the second of February of the succeeding year."

"It may be laid down as a sound proposition, that participation in the elective franchise is a 'privilege' rather than a right, and is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible, consistent with the public safety.—Cooley's Con. Lim." (5th Ed. 752).

Adverting to your second question, relative to the payment of poll tax, Section 178 of the Constitution is mandatory and no person can legally vote as an elector unless the poll taxes mentioned are paid. Such person must first be a citizen of the United States, and of the State of Alabama. Second, such person must have resided in the State for two years, the county twelve months and in the precinct or ward ninety (90) days. And in addition, such person must possess the qualifications mentioned in Sections 180 and 181 of the Constitution of 1901. Section 190 of the Constitution makes it mandatory upon the legislature to pass laws "to regulate and govern elections." And in pursuance to that positive mandate it (the legislature) acting within legislative competency enacted Sections 3906 and 3907 of the Code of Alabama, 1923, providing penalties for any person offering to vote or voting illegally. These two sections read as follows:

"3906. Illegal voting or attempting to vote.—Any person who votes more than once at any election held in this State, or deposits more than one ballot for the same office, as his vote at such election, or knowingly attempts to vote when he is not entitled to do so, or is guilty of any kind of illegal or fraudulent voting, must, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years at the discretion of the jury."

"3907. Voting without registration and taking oath.—Any person voting at any county or state election who has not registered and taken and subscribed to the registration oath, must, on conviction, be fined not less than one hundred nor more than one thousand dollars, or imprisoned in the county jail, or sentenced to hard labor for the county for not less than one nor more than six months."

As hereinbefore said "participation in the elective franchise is a **privilege** rather than a right." The ballot box is the only sure foundation of republican liberty, and needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity or tyranny.

Washington v. The State, 75 Ala. 582.

It therefore follows that one who has not complied with the cited sections of the Constitution and the Code cannot vote at an election held by the people.

To permit persons to exercise the elective franchise who are disqualified will pollute the ballot box, which is the very foundation of liberty, and from which springs all of our institutions, viz: the Executive branch of our Government, the chief of which appoints jury commissioners to select persons for jury service by placing the names of citizens in the jury box, and from the jury box persons are selected to pass upon the life, liberty and property rights of the citizens. And if the purity of the ballot box is to be preserved, no disqualified person should be permitted to vote, because through that box, the executive, legislative and judicial officers of our government are selected, and if the ballot box should be polluted by illegal votes, the contamination will eventually spread and all branches of government become corrupt. "Whatever (it is said) tends to corrupt elections in a free government or detracts from the efficiency and honesty of the public service must needs be a matter of grave public concern, and all methods which have for their object the prevention of these abuses which every good citizen has observed with profound apprehension, by which incompetent and corrupt men have been chosen to offices of trust and power, should be commended and upheld."—Merriam and Overacker on Primary Elections, p. 112.

Ignorances of the law is no excuse, and every person is presumed to know that it is a violation of the law to vote or offer to vote unless he has registered as an elector and paid all poll taxes due.

Since the fixation of a poll tax, the time of accrual of the same and the payment thereof as a condition to vote, as well as all exemptions therefrom, are provided for and regulated by the Constitution which provides that, as a

condition to the right of those between twenty-one and forty-five years of age to vote, they, if not exempt by existing laws, must pay such poll taxes.

Graves v. Eubanks, 205 Ala. 174.

It necessarily follows that one who is forty-five years of age must pay all delinquent poll taxes before he can vote as an elector.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 22, 1930.

The Tax Collector,
Birmingham, Jefferson County, Alabama.

Deputy Tax Assessor appointed under Section 25A by an Act of the Legislature September 13, 1923, (General Acts of Alabama, 1923, pp. 293-294) entitled to fee of fifty cents charged for each escaped assessment.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of recent date in which you request an opinion from the Attorney General on the following question of law:

Whether or not deputy tax assessors appointed under authority of Section 25A of the Act approved September 13, 1923, (Acts 1923, p. 293) are entitled to the fee of fifty cents charged for each escaped assessment, or should said fee be paid over to the tax assessor?

In answer to your question I am of the opinion that the deputy tax assessor provided for in the above referred to section, is an agent appointed by the State Tax Commission, and is clothed with all the powers and duties of the county tax assessor in assessing escaped personal property subject to taxation, and which has not been assessed.

Section 25A of the Act, supra.

That Section reads in part as follows.

“ * * * Such deputy tax assessor shall have the same power and authority as county tax assessors in the performance of their duties in the assessment of personal property which has escaped taxation.”

Under Section 39, Act approved August 22, 1923 (Acts 1923, p. 175) the county tax assessor has the power and authority to list, return and value any property which has escaped taxation in any assessment within five years.

Under Section 62, Act approved September 15, 1919, (Acts 1919, p. 304) the county tax assessor shall be entitled to the **same fees** for making returns of property which have **escaped** taxation as for making returns of property after **demand** made by him upon the taxpayer.

Under Section 52, Act approved September 15, 1919, *supra*, (Acts 1919, p. 302), the county tax assessor has the power and authority and the law makes it his duty to make a demand on all taxpayers, after the thirty-first day of December of each year, who have failed to make returns to him for a list of their taxable property. For making this demand the tax assessor shall be entitled to a fee of fifty cents to be paid by the taxpayer which shall be added to his tax list and collected with the tax.

A fee is payment for services done or to be done * * * sometimes fixed by law or custom and sometimes optional.

Vol. 2, Words and Phrases, pp. 477-478.

It is optional with the tax assessor as to whether or not he shall charge the fee; it belongs to him and he may give it away.

Adverting to the Act approved September 13, 1923, *supra*, Section 25A provides the compensation for the deputy tax assessor appointed by the State Tax Commission. The compensation so fixed "shall not exceed twenty per cent of the actual amount of money collected by the county tax collector on the escaped personal property listed and assessed by said deputy assessor."

The compensation with which the Tax Commission is concerned is limited to twenty per cent of the money collected on the escaped taxes. The fee of fifty cents fixed by law and which under the law the deputy tax assessor has the power to demand and the authority to receive, in that he is clothed by the provisions of the law with the same authority and power of the county tax assessor, is no part of the tax. It is optional with the county tax assessor as to whether or not he shall charge the fee and it is equally optional with the deputy tax assessor appointed by the State Tax Commission. If, however, the fee is demanded by the deputy tax assessor and is collected by the county tax collector, such fee does not belong to the County Treasury or State Treasury, but to the deputy tax assessor who made the escaped assessment and who had the power and authority to demand and receive the same equal to the power and authority granted by law to county tax assessors in similar instances. If such fees attached to such assessments have been collected by the county tax collector and are in the hands of said collector now remaining it is the duty of said tax collector to pay the same to the deputy tax assessor taking his receipt therefor. Neither the State nor the County has any interest in such fees. If such fees collected by the collector have been paid into the County Treasury, such deputy tax assessor has valid and legal claim against the county for the amount of such fees erroneously paid into the County Treasury.

Fees and compensation have a different meaning. To "Compensate" is to make suitable reward for services.—Vol. 1, Words and Phrases, 2nd Series, p. 826.

While the term "fees" is applicable to the items chargeable between an officer and a person who he serves.—Vol. 2, Words and Phrases, 2nd Series, p. 478.

In an opinion addressed to the Chief Examiner, Department of Examiners of Accounts, on October 10, 1929, (Opinions of Attorney General, Book 15, office edition, pp. 28, 29, 30, 31) I hold that "no fee of any kind is provided for making demand for list of personal property or for making the assessment thereof by such deputy" and that "in such case no fee is chargeable." That opinion is, therefore, amplified, and the last quoted parts of same are hereby withdrawn and overruled.

The opinion of this office to the Tax Collector of Jefferson County dated October 5, 1928, holding that the county tax assessor is entitled to such fee, whether listing an assessment of escaped property was made by the said deputy appointed by the State Tax Commission, was overruled.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 22, 1930.

Judge of Probate,
Carrollton, Pickens County, Ala.

Truck license—Non-resident hauling gravel over highways of State for hire must pay.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of September 9, 1930, in which you state as follows:

"A" lives in Mississippi and is hauling gravel from a gravel pit located in Alabama into Mississippi for the purpose of constructing or graveling a public road in Mississippi. "A" has no camp in Alabama, but leaves his home in Mississippi hauls gravel for hire from Alabama to Mississippi during the day and returns home at night. This hauling is being done by individuals driving their own trucks and each has a Mississippi tag.

You request my opinion:

If truck owners operating trucks under the above circumstances are liable for a truck license in Alabama?

I am of the opinion your question should be answered in the affirmative.

Section 19 of an Act approved July 22, 1927 (General Acts 1927, p. 160) is as follows:

"Section 19. EXEMPTION OF NON-RESIDENT OWNERS.—Exemption of non-resident owners: The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this State and not used **for hire** in this State, provided that the owner thereof shall have

complied with the provisions of the law of the foreign county, State, territory, or federal district of his residence relative to registration of motor vehicles and the display of registration numbers thereon, and shall conspicuously display his registration number as required thereby. The provisions of this section shall apply as to a motor vehicle owned by a non-resident of this State only to the extent that under the laws of the foreign county, State, territory or federal district of his residence like exemptions and privileges are granted to motor vehicles duly registered under the laws of and owned by residents of this State, **provided that nothing therein shall be construed to permit the use of motor vehicles for hire by non-residents without complying with the provisions of this Act.**"

After a careful reading of Section 19, *supra*, you will see that the legislature did not intend to exempt any motor vehicle **which was used for hire** by non-residents. The owners of these trucks are certainly hauling gravel for hire. It makes no difference where the trucks are kept at night. During the daytime they are being run over the highways of this State for hire, subjecting said highways to wear and tear. In writing Section 19 of the Act, *supra*, the Legislature did not intend to exempt motor vehicles used for hire, in any manner, shape or form, from the payment of the motor vehicle license tax.

Motor vehicles used by visitors sojourning in this State, or passing through this State, are the motor vehicles the Legislature had in mind when it enacted the quoted section of the Act under consideration; in providing a "reciprocal exemption", for non-residents, it was not intended that motor vehicles used for hauling gravel **for hire** over the highways of this State, should be exempt.

Opinions Attorney General, 1926-28, p. 464.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 23, 1930.

The Tax Collector,
Birmingham, Jefferson County, Alabama.

Premiums on bonds of deputies or clerks in the office of Tax Collector cannot be paid by the County.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of January 16, 1930, in which you state that you have a number of deputies or clerks working in your office who handle large sums of money belonging to the State and County.

You request my opinion:

Can the Board of Revenue by resolution authorize the County Treasurer to pay the premiums on the bonds of all such deputies or clerks?

It is my opinion it cannot. Section 2688, Code of Alabama, 1928, requires all bonds of **county officials** to be made in some surety company authorized to do business in the State of Alabama. This Section reads as follows:

"Bonds of county officers made by surety or guarantee companies.—After the adoption of this Code the officers and authorities authorized to fix and approve or to require additional bonds as to all county officers shall require that the bond of such county officer be made by some surety or guarantee company or companies authorized by the laws of this state to make such bond; and the premiums of such bonds shall be a charge against the county and payable out of the county treasury upon the certificate of the officer or agency requiring, fixing or approving the bond."

Section 8846, Code of Alabama, 1923, fixes the bond of tax collectors of the various counties. This Section is as follows:

"Official bond.—Before entering upon the discharge of the duties of his office, the tax collector must execute bond in duplicate, payable to the State of Alabama, in double the probable amount of the taxes that may at any time be in hands, to be determined for every county by the state auditor, with a surety company qualified to do business in Alabama, to be approved by the judge of probate of his county, conditioned faithfully to discharge the duties of his office, which are or may be required of him by law during the time he continues therein, or discharges any of the duties thereof. One of such duplicates shall be filed and recorded in the office of the judge of probate, and the other shall be filed in the office of the state auditor, on or before the first day of September next after his election. A new bond, or bond for an additional amount may be required whenever in the judgment of the state auditor the public welfare demands such action. The cost of the bond required in this section shall be paid out of the general fund of the county on warrant of the court of county commissioners, or court of like jurisdiction, and same shall be preferred claim against the county."

This Section has to do with the bond of the Tax Collector and nowhere refers to the bond of deputies or clerks who may be employed by the Tax Collector.

It is true that Section 3 of an Act approved September 14, 1915, (Local Acts, 1915, page 375) deals with deputies, clerks and employes of the various officers of Jefferson County, regulates how they are to be paid and ends with the following general provision:

"The Board of Revenue is authorized to adopt rules and regulations for the conduct and operation of all such officers made necessary by changing the method and basis of compensation under this Act."

But it no where suggests that such deputies or clerks shall be required to execute a bond for the faithful performance of their duties. Section 3, *supra*, of which the above quotation is a part is in full as follows:

"The board of revenue of Jefferson County is authorized and empowered to provide for sufficient clerical and other assistance, to and deputies of the said officers, and to fix their compensation and to provide how they shall be paid; provided that the circuit judges shall fix the number of clerks and assistants in the office of the clerk of the circuit court. The compensation of the assistants and deputies and all other officers affected by this bill to be fixed by the board of revenue; but the selection of such deputies and assistants shall be left to the officers under whom they are employed, and said officers shall have the right to discharge said deputies and assistants at will. The board of revenue is authorized to adopt rules and regulations for the conduct and operation of all such officers made necessary by changing the method and basis of compensation under this act."

I am unable to find any provision of law, general or local, that requires such deputies, clerks or assistants to be under bond. The Tax Collector's bond is supposed to be sufficient to cover all funds that come into his hands and in this way to sufficiently protect the interest of the State and County and this is as far as the State and County are interested. (It is true that for the individual protection of the Collector he may require such subordinates to make bond payable to him which would protect him and his bond in case of default, but certainly the County could not be interested in this and by no stretch of the imagination could be held liable for the premiums on such bonds.) It is true again, that Sub-Section 3, *supra*, says in part as quoted above "The Board of Revenue is authorized to adopt rules and regulations for the conduct and operation of all such officers made necessary by the change, the method and basis of compensation under this act." While the above quotation of Section 3 is very broad in its provisions yet it clearly has reference to the change in the methods and basis of compensation and nothing more. It cannot be construed directly or by implication to repeal or enlarge or extend the plain provision of Section 3046, *supra*, so far as it relates to Jefferson County.

Biennial Report of Attorney General, 1926-1928, p. 261.

Report of Attorney General, Book 8, p. 5, (office edition).

Report of Attorney General, Book 8, p. 265 (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 23, 1930.

The State Tax Commission,
CAPITOL.

Sale of cars which have been confiscated under the prohibition law does not carry with it the license and tag belonging to said car.

Opinion by Assistant Attorney General Haynes.

Gentlemen:

I have your letter of May 20, 1930, in which you state that it is the custom in Montgomery, Alabama, when a car is confiscated under the prohibition law to sell such car with the tag found on the car when seized.

You request my opinion:

Does such sale convey the legal title to the license and tag on such car, and does it protect the purchaser so far as the license is concerned?

In my opinion it does not. There is but one way to pass the legal title to such a license and tag when it is sold by the owner to the third person and that is by having the same transferred as is provided by Section 12 of an Act approved September 13, 1923 (General Acts 1923, p. 285) which is in part as follows:

" * * * persons paying an automobile license may have the same transferred to any other person, or to any other car, provided the same is not of a greater horse power, by applying to the probate judge who issued the same, and it shall be his duty to make a record of the transfer, which shall be in writing * * * ."

Biennial Report of Attorney General, 1926-28, p. 28.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 23, 1930.

The Judge of Probate,
Opelika, Lee County, Alabama.

Automobile—Transfer of license tags.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of April 7, 1930. You state that an original purchaser of an automobile license tag trades automobiles and has said tag transferred from his old car to the one for which he has traded. That later this original purchaser sells the automobile to which the tag was transferred.

You request my opinion:

Under the above statement of facts can the original purchaser of the license tag transfer this tag to the person to whom he sells the automobile?

I am of the opinion your question should be answered in the affirmative. Section 12 of an Act approved Sept. 13, 1923, (General Acts 1923, pp. 285, 286) provided in parts as follows.

" * * * **Persons paying** an automobile license may have the same transferred to any other person, or to any other car, provided the same is not of a greater horse power * * * .

Clearly the above expression "Persons paying an automobile license" refers to the person who originally obtained the license. That is the person who originally procured the license may transfer it to **any car** not of a greater horse power. It being essential only that the application for the transfer be made by the person who originally procured said license. The person to whom the transfer was made by the original purchaser could not in turn transfer the license.

See Opinion Attorney General, May 7, 1929, (Vol. 11 p. 56, Office Edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 24, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Foreign cars and trucks operating in Alabama for hire must carry an Alabama license and tag.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 20, 1930, in which you state that you are handing me a letter from Leroy F. Hill, Secretary-Manager of the Alabama Motorists Association, which has reference to liability for license for trucks passing through Alabama. There seems to be much contention between the Florida and Alabama authorities, as well as between the Mississippi authorities and Alabama authorities, and also between the Tennessee and Alabama authorities relative to the use of truck license. It appears that Alabamians going into these different states are being required to take out license in these states although having an Alabama tag, and reciprocity and comity seem to have been forgotten.

You request my opinion:

Do cars and trucks from Florida which operate in Alabama for the purpose of hauling freight and carrying passengers for hire have to carry an Alabama license etc.?

In my opinion all cars which come into Alabama from adjoining states which are operated for hire for the purpose of hauling freight and passengers must carry an Alabama license. Section 31, Schedule 1, page 223, Revenue Laws of Alabama, 1929, settles this question and is in part as follows:

"Section 31. (Acts 1927, p. 139, Sec. 19). Exemption of non-resident owners.—Exemption of non-resident owners: The provisions of the foregoing sections relative to registration and display of registration numbers shall not apply to a motor vehicle owned by a non-resident of this State and not used **for hire** in this State. * * * "

Opinion of Attorney General of Sept. 22, 1930, to Judge of Probate, Pickens Co., Book 19, office edition.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 24, 1930.

The Sheriff,
Luverne, Crenshaw County, Ala.

Sheriffs—Fee for empanelling jury in capital cases.

How claim is paid for attending Circuit, Probate, County and Chancery Courts.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 15, 1930, in which you request my opinion as follows:

1. Does the sheriff's fee for empanelling the jury in capital cases come under Section 231, Code of Alabama, 1923, and is it a preferred claim?
2. Does this claim for attending Probate Court, Circuit Court and Chancery Court also come under Section 231, supra, and is it preferred?
3. In case these claims are due to be paid in cash out of the county treasury, then advise me as to whom should certify to their correctness, whether the judge trying the case or should they be filed with the Commissioners Court, and passed for payment in regular order?

Answering your first inquiry, I find no authority of law for you to receive pay for the empanelling of a jury in a capital case. However, I do find that under Section 3741, Code of Alabama, 1923, you are entitled to a fee of \$5.00

for summoning jury in capital cases, or at any special court for the trial of criminal, and this is paid by the county. This section reads in part:

"For summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury \$5.00."

This item would come under Section 231, *supra*, and is a preferred claim.

Answering your second request, I am at a loss to know just what you refer to whom you speak of your attending on the Circuit, County, Probate and Chancery Court. If you have reference to attending as a witness my answer is in the negative. If you have reference to your attendance under Section 3441, *supra*, which provides in part as follows:

"For attending each day on such court to be paid by the county

..... \$2.00"

My answer would be in the affirmative. Of course, this has reference to the trial of capital case held at a regular term or a special term as provided by subdivision quoted above. In other words this claim is paid by the county, and is a part of the sheriff's compensation due him by the county, and would fall under the provisions of Section 231, *supra*, and, therefore, would be a preferred claim.

Answering your third inquiry, I find no provision of law for either of the above claims being approved by the presiding judge. The judge only approves same when the fee or charge is paid by the State under Section 3750, Code of Alabama, 1923. Therefore, it is my opinion that when the fee is paid by the county as is provided for such claims as we now have under consideration, you will have to make out your account against the county, showing item by item services rendered, swear to same, present it to your court of county commissioners or board of revenue, and have it passed as other claims against the county.

Yours truly,

CHARLIE C. McCALL,

Attorney General.

September 24, 1930.

The Register,
Circuit Court in Equity,
Vernon, Lamar County, Alabama.

Trial Tax—Ancillary proceedings—Taxable on petition to remarry.

Opinion by the Attorney General.

Dear Madam:

I have your letter of April 29, 1930. In it you state:

On November 5, 1928, Thelma Roden filed a bill of divorce from Fred Roden charging abandonment. On December 14, 1928, a decree was

rendered by Judge R. L. Blanton permitting Thelma Roden to remarry, but the right to remarry was not granted at that time to Fred Roden. On April 22, 1930, Fred Roden filed petition supported by three affidavits to remarry. I have already collected trial tax on the case of Thelma Roden v. Fred Roden and remitted it January 1, 1929.

You request my opinion:

Should I collect a trial tax on the petition of Fred Roden to remarry? In answer thereto will state that you should.

Opinions Attorney General, 1926-1928, p. 169.

In the aforecited opinion rendered to the Circuit Clerk of Coffee County, Alabama, April 23, 1927, I stated:

"There is no doubt that this section (meaning Section 4½, of the Act approved September 15, 1919, General Acts 1919, p. 284) applies to all cases placed on the docket in the Circuit Court, whether original or whether it be a case growing out of the original suit."

On January 5, 1928, an opinion was rendered to the Register in Chancery of Escambia County, interpreting the legislative intent as being to levy a trial tax on original cases, and not upon any ancillary proceedings that might grow out of an original case.

That opinion was subsequently withdrawn and is hereby overruled in its entirety.

You should follow the opinion to the Circuit Clerk of Coffee County aforementioned.

There can be no doubt but that the purpose and intent of Section 4½ of the Act, *supra*, was to impose a trial tax on each case, civil, criminal and equity, which goes upon the docket.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 25, 1930.

Clerk of the Circuit Court,
Dothan, Houston County, Ala.

Trial tax—chargeable on forfeiture of appearance bond.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 17, 1930, in which you state that the bond of defendant was forfeited and notice served on bondsmen and de-

feudant and defendant rearrested, and later bond forfeiture was docketed and at a subsequent term of court forfeiture was made final for one cent and cost.

You request my opinion.

Does the trial tax of three dollars attach in matters of this character?

I am of the opinion it does. Section 4½ of an Act approved September 23, 1919 (General Acts 1919, p. 284) is as follows:

"That a trial tax of three dollars be, and the same hereby is, imposed in each case, civil, criminal and equity, which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs, and when collected, to be paid by the clerk of such court into the general funds of the State Treasury."

You will note that the above quoted Section says among other things "each case." The forfeiture on the official bond is docketed separately from the original case and I call your attention to the fact that the original case was a criminal proceeding. The action taken on a forfeiture of this character is a civil proceeding, and, therefore, could not be said to be a part of the original case. I am, therefore, as stated above, of the opinion that it carries with it a trial tax of three dollars.

Biennial Report of Attorney General, 1926-28, p. 169.

Yours truly,

CHARLIE C. McCALL,

Attorney General.

Sept. 25, 1930.

Dr. J. N. Baker,
State Health Officer,
CAPITOL.

Health provisions by County—Appropriation from general fund for health work. Claim thereby created.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of August 29, 1930.

You state that Houston County has appropriated \$5,500 annually from its general fund for the operation of a full time health department.

You wish my opinion:

Whether this now constitutes a preferred claim against the County of Houston.

Section 1060 of the Alabama Code of 1928, annotated, reads:

"1060. Claims of health department of counties or municipalities to be paid out of budget.—In all counties or municipalities which have provided, or which have aided in providing, a budget out of which the claims, demands and expenses of the health department shall be paid, then such claims and demands of the health department shall not be a claim against the county or municipal treasury, but shall be paid out of the budget or funds, provided the county or municipality has paid into the budget its aliquor or required part of such budget."

This Section provides that counties or municipalities may provide, independently or conjointly, a budget out of which health claims, demands and expenses may be met, and when this is done in accordance with this section, such amount or sum as is set aside shall constitute the budget or funds from which such claims shall be paid, as distinguished from the county or municipal treasury. This is not a preferred claim in the sense in which a **preferred claim** is mentioned in the statute, but becomes an independent fund that can only be used for the purpose to which it is dedicated.

It is my opinion, however, that before a county can so set apart and vote a fund to this appropriation it must be able to meet its preferred claim under Section 231, Alabama Code of 1928, Annotated. That is, so long as a county has the money to meet its statutory preferred claims it may if it sees fit, by complying with the provisions of Section 1060, as above suggested, make appropriations for the special fund therein provided.

Opinion of Attorney General, Book 14, p. 39 (Office Edition).

Opinion of Attorney General, Book 19, p. 36 (Office Edition).

Yours truly,

CHARLIE C. McCALL,
Attorney General.

September 25, 1930.

The Judge of Probate,
Fort Payne, DeKalb County, Alabama.

Court of County Commissioners: Itemized report should show receipts and expenditures, specifying particularly the sources from which received and purposes for which expended.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of June 10, 1930, in which you state that heretofore the Court of County Commissioners has been making its report required by Section 6766 of the Code of Alabama, 1923, itemizing each receipt and disbursement separately, showing the amount of each warrant and for what it was given, but that the Commissioners are under the impression that it is

only necessary to show the total of each amount of disbursement and not each warrant separately.

You request my opinion construing Section 6766 of the Code of Alabama, 1923, requiring the Court of County Commissioners to publish the receipts and disbursements of the county.

It is my opinion that Section 6766 of the Code, as amended by an Act approved September 6, 1927 (Acts 1927, p. 691) clearly expresses its meaning, and is capable of only one construction. Said section as amended reads as follows:

"Be it Enacted by the Legislature of Alabama that Section 6766 of The Code of Alabama be amended so as to read as follows: The courts of county commissioners, boards of revenue or like governing bodies shall make a semi-annual publication on the first day of January and July of each year, in a newspaper published in the county, of an itemized report, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purpose for which expended. Said publication must also show the entire indebtedness of the county, of whatever kind and character, specifying particularly the amount of bonds outstanding, their character and when due; the amount of the outstanding warrants, whether interest-bearing or not, and if interest-bearing, the rate of interest, for what said warrants were issued and when due and payable; provided, however, that in all counties having a population of two hundred thousand or more, according to the last or any subsequent Federal Census, that the reports above provided for shall be published annually on the first day of October of each year."

It is only necessary to call attention to that part of the above quoted section which sets out that the **itemized report** shall show receipts and expenditures of money for the county, **specifying particularly** the sources from which received and the purpose for which expended. The impression of the Commissioners that it is only necessary to show the total of each amount of disbursements and not itemize each warrant separately is entirely erroneous.

The statute requires the semi-annual publication of an itemized report and sets out particularly what this itemized report should show. The Court of County Commissioners was entirely right in its former procedure in itemizing each receipt and disbursement separately.

Report Attorney General, 1926-1928, p. 58.

Report Attorney General, 1926-1928, p. 275.

The above is the general law of the State on the subject.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 25, 1930.

The Sheriff,
Russellville, Franklin County, Ala.

Sunday Law—Playing of "miniature golf" on Sunday not a violation of Section 5540, Code of Alabama, 1923.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 22, 1930, referring to Section 5540, Code of Alabama, 1923. You request my opinion.

Does Section 5540, Code of Alabama, 1923, prohibit the playing of "miniature golf" on Sunday?

In answer to your question will state that said section of the Code does not prohibit the playing of "miniature golf" on Sunday. Section 5540, Code of Alabama, 1923, reads as follows:

"5540. Baseball and other games not played on Sunday.—Any person or persons who play or engage in the playing of any baseball, or football, tennis or golf on Sunday, in any public place or places where people resort for such purpose, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars nor more than fifty dollars."

This section was a part of the Code of Alabama, 1907, (See Section 7818, Code of Alabama, 1907).

When this statute was enacted it had reference to golf as then played. So far as I can ascertain there wasn't any such thing as "miniature golf" at the time of the enactment of the statute. There may be some similarity between games of regular golf and "miniature golf," but very little. The obvious intention of the Legislature was to prohibit the playing of games of **regular** golf on Sunday in any public place or places where people resorted for such purposes.

I might state in passing that I have read carefully the cases of

Walton v. State, 62 Ala. 197,

Huffman v. State, 29 Ala. 40,

Birmingham Railway Light and Power Co. v. Millbrat, 78 So. 224, and I am of the opinion that none of these cases apply in this instance. I cannot see how, by any stretch of the imagination, it could be assumed that back before 1907, when the statute was enacted the Legislature could have had in mind these new-fangled games which might be called anything other than "golf."

I invite your attention to the fact that on June 5, 1930, this office rendered an opinion to the State Tax Commission holding that Schedules 33 and 40 of Section 361 of the General Revenue Act of 1919 did not apply to

"miniature golf" links, and while these are revenue statutes, at the same time, they are construed strictly against the State. It is a general rule of statutory construction that a criminal statute must be strictly construed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 25, 1930.

The Judge of Probate,
Ashland, Clay County, Ala.

Elections—General—Form and character of ballots in.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 22, 1930. In it you state:

"Up to date there have not been certified to me as Judge of Probate the names of any candidates for office who will be voted for in this county on November 4th except, members of the Democratic party and the Jeffersonian party. It now appears that no one will run for office in this county as a Republican and therefore no names can be placed on the ballot under the Republican emblem either for State, district or county office. If this be true, shall I leave off the Republican emblem and column of the ballot and have printed only the Democratic emblem and the names under it and the Jeffersonian emblem and the names under it and the Independent column at the right?

I have examined Sections 462, 463, 464 and 469 and it seems to me that if I have no candidate running as a Republican the Republican column should be left off, and that I should not print the Republican emblem on the ticket. Section 469 as I understand it requires that every ballot shall contain a party device for each political party represented on the ticket. But if I have no one certified to be as a Republican by the Secretary of State or by any party of caucus as a Republican it seems to me that I should not print the Republican emblem on the ticket."

I am of the opinion that if no one has been certified to you as candidate for office on the Republican ticket by the proper authorities within the time required by law, there is no reason to print the Republican emblem on the ticket. Your citation of the law is correct. Sections 462, 463, 464, 465, 468, 469 and 470, Code of Alabama, 1923. In my opinion it was never the intent of the law to require a column for a political party where that party did not put in some candidate for nomination in the form provided by law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 26, 1930.

The Judge of Probate,
Opelika, Lee County, Alabama.

Deed filing tax: No filing tax due on deeds executed for nominal consideration.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of August 29, 1930, in which you state:

The Prudential Insurance Company of America, a corporation, held a mortgage against the property described in the deed attached, in the amount of \$9,000.00 which mortgage was executed by the Central Bond and Mortgage Company (formerly the Excelsior Realty Company, Inc.). The Central Bond and Mortgage Company having defaulted in their interest payment, the Prudential Insurance Company threatened to foreclose the mortgage, and to avoid the expense of such foreclosure and any deficiency judgment that may have arisen thereunder from sale under foreclosure, the Central Bond and Mortgage Company gave the attached deed to their equity, for a consideration that is nominal.

The actual value of the property conveyed in this deed would be considerably short of the amount of the mortgage the Prudential holds against it.

You request my opinion:

What amount of tax, if any, is due in this instrument?

Answering your question, I am of the opinion that no deed filing tax is due in this case.

That part of Section 21½ of an Act approved July 22, 1927 (Acts 1927, p. 163) which is pertinent to your inquiry, reads as follows:

"Section 21½. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this State, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances executed prior to October 1st, 1923, shall be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record, to-wit: Upon all such instruments which are executed to convey real or personal property situated in this State of the value of five hundred dollars or less there shall be paid the sum of fifty cents, and upon all such instruments executed to convey real or personal property situated in this State of more than five hundred dollars in value there shall be paid the sum of fifty cents for each five hundred dollars or

fraction thereof in value of property conveyed by such instrument. Provided, that only the value in excess of any mortgages or vendors lien upon any property within this State on which the mortgage tax has been paid, shall be taxable under this section."

The above quoted section expressly excepts from this tax "deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds executed prior to October 1st, 1923. It appears from your letter and the deed submitted that the consideration in the instant case was nominal and that there was no excess in the value of the real estate over the amount of the mortgage.

The Prudential Insurance Company of America held the title to this property under the mortgage, and if you are satisfied that there is no excess in value of the real estate over the amount of the mortgage, and that the deed was given for the purpose of perfecting the written title, then no tax is required.

Opinion Attorney General, Book 17, p. 74 (office edition).
Report Attorney General, 1926-1928, pp. 680-682.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 26, 1930.

The State Tax Commission,
CAPITOL.

License tax—construing Schedule 74 of Section 361 of an Act approved September 18, 1919, (General Acts 1919, p. 424); the words "in quantities of twenty-five gallons or more" defines who are wholesalers.

Opinion by Assistant Attorney General Cobb.

Dear Sirs:

I have your letter of November 19, 1929, in which you state:

Schedule 74 of Section 361 of the General Revenue Act of 1919 levies a license on wholesale dealers in oils.

"The question has arisen whether the license by this act is to be charged only on sales which aggregate twenty-five gallons or whether the 'twenty-five gallons or more' is no more than a definition of the meaning of 'at wholesale.' In other words, if the words are a definition only, then the schedule would mean that a person engaged in selling oils where such sales usually amount to twenty-five gallons or more would be required to pay this tax, but that the tax itself was to be paid on the entire gross sales. This Commission has always been of the opinion that the words 'twenty-five gallons or more' constituted merely a definition of a wholesaler. We have not thought that the Legislature intended for a

person selling oils to go through his books for the past year and to pick out sales exceeding twenty-five gallons and pay the tax on this part of his business."

You request my opinion:

What construction should be placed on the words "in quantities of twenty-five gallons or more" as set out in the above mentioned schedule?

Schedule 74, *supra*, reads in part as follows:

"OILS, WHOLESALE:—Each person, firm, corporation or agency selling illuminating, lubricating or fuel oils or gasoline at wholesale, that is to say, in quantities of twenty-five gallons or more, shall pay to the State Treasurer for the use of the State within two weeks from the beginning of the fiscal year, the sum of one-half of one per centum on his gross sales for the preceding fiscal year."

In my opinion, the words "in quantities of twenty-five gallons or more," merely defines who are wholesalers. Therefore, each person, firm, corporation or agency selling fuel oil in quantities of twenty-five gallons or more are wholesalers and are required to pay a license tax of one-half of one per centum on his gross sales for the preceding fiscal year.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 26, 1930.

The Sheriff,
Russellville, Franklin County, Alabama.

Slot machines—seizure of—detinue does not lie for recovery pending prosecution.

Opinion by the Attorney General.

Dear Sir:

I have a letter dated September 23, 1930, from Hon. J. Foy Guin, your attorney, requesting that I render an opinion to you upon the following statement of facts:

Recently a state law enforcement officer seized three slot machines and left them in charge of the sheriff, stating that it was his intention to file a bill in equity and have same forfeited as contraband and sold. The owner has now appeared and demanded that the sheriff deliver his property to him. It is claimed that the machines are gambling devices and were being operated contrary to the law.

My opinion is requested as to whether or not, you, as sheriff, are justified in holding the machines against the demand of the legal owner who is threatening a detinue suit?

It is a violation of the criminal laws of Alabama for one to operate a lottery or to set up, carry on, or operate a device of chance such as a slot machine. The best evidence that the party is operating a device of chance is the machine which he is charged with operating. The law enforcement officer had a right to seize the machine and hold it for evidence in the trial of the case and pending its final disposition. I assume that the law enforcement officer did this and merely turned the machines over to the sheriff for safe-keeping. He could have put them in some other place than in the sheriff's office. The sheriff is not the legal custodian of the machines. The law enforcement officer who seized them is the legal custodian and it is his duty to produce them in court in making out his case against the defendant. Detinue will not hold, in my opinion, to recover the machines no more than it would hold to recover a pistol taken off a burglar pending the final disposition of the charge of burglary.

As to the other matter, relating to the condemnation and destruction of the machines, I will advise you later.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 27, 1930.

The Judge of Probate,
Grove Hill, Clarke County, Alabama.

Election—Primary—Corrupt Practice Act—As applied to candidates for State Senator and Representative in the Legislature—Criminal provisions.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 24, 1930. You call attention to the Corrupt Practice law as applied to Primary Elections in the Code of Alabama, 1923, and also call attention to Section 3946 of said Code.

You request my opinion:

What is the law as to the filing of expense accounts in Primary Elections with reference to candidates for the State Senate and Representative in the Legislature and what is the effect of the failure to file said expense accounts by said candidates?

Chapter 19, Code of Alabama, 1923, being Sections 361-600 inclusive, applies first to General Elections. Chapter 20, Code of Alabama, 1923, being Sections 601-684, inclusive, applies to Primary Elections. The Corrupt Practice Act is found in Chapter 19 of said Code. Section 522 of Article 16 of Chapter 19 provides that:

"All the provisions of this **Chapter** shall apply to all **primary** elections * * * held in this State, except in cases where the provisions hereof are inconsistent or in conflict with the provisions of law governing primary * * * elections."

Therefore the Corrupt Practice Law (Article 26 of Chapter 19) applies to Primary Elections. Under the Corrupt Practice Law a "political committee", "candidate", the word "election", the expression "corrupt practice", is defined (Sections 582, 583, 584, 585, Code of Alabama, 1923).

By Section 586 of said Code it is provided that a candidate for the office of State Senator shall not expend a sum in excess of \$300.00 and a candidate for State Representative shall not expend a sum in excess of \$250.00. It is also provided in said Section 586 that the amount assessed against any candidate as a fee for qualifying shall not be included in the total of the above expenditures.

By Section 587, Code of Alabama, 1923, it is provided that where such a candidate expends for the purposes mentioned in said Article, an amount in excess of the amount specified, such candidate shall be guilty of a corrupt practice and such act on his part shall disqualify him for said office.

By Section 588, Code of Alabama, 1923, it is provided that **within five days after announcement** of his candidacy, a candidate for Representative in the Legislature shall file with the Probate Judge of his County, and a candidate for State Senator shall file with the Probate Judge of each county in his district, the name of not less than one nor more than five persons elected by him to receive, expend, audit and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose. Such committees or committee shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee, and he shall keep detailed account of receipts, payments and liabilities. Said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. There are other provisions in said Section.

Where a person acts as his own committee he is governed by the provisions of Article 26 of Chapter 19 of said Code, and failure to make the declaration of appointment or selection as therein required is declared to be a corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election. (Section 589, Code of Alabama, 1923).

It is also provided that the failure to perform any of the **other acts** mentioned in Article 26 or the performance of acts therein forbidden, is a corrupt practice. (Section 590, Code of Alabama, 1923).

By Section 592 of said Code it is provided that every committee appointed under Article 26, *supra*, and as defined in Section 588 of said Code, shall file in the office of the Judge of Probate of the County in which the candidate by which said committee was appointed resides, if such candidate is a candidate for State Senator or Representative in the Legislature, detailed, itemized statements of all expenditures made. It will be noticed that no time is specified in this Section.

By Section 593 of said Code it is provided that not more than ten days nor less than five days **prior** to the election **and** within fifteen days **after** the election, every committee shall file statements giving in itemized, detailed form, including names, items and detailed amounts, covering all of the expenditures made directly or indirectly, and all obligations, debtors, or liabilities assumed or incurred at the time of filing of said statement shall include the names of all contributors of amounts in excess of \$10.00, with amounts given by each, and a list of all gifts, loans or contributions made. Such statements shall itemize all moneys expended in sums over \$5.00, and shall give the names of the various persons to whom such moneys were paid, the specific nature of each item, by whom the service was performed, and the purpose for which it was expended. There shall be attached to such statement an affidavit subscribed and sworn by the treasurer of said committee setting forth in substance that the statement thus made is in all respects true, and that the same is a full and detailed statement of all moneys, securities, or equivalents for money coming under the control or custody of the committee and by them expended **directly or indirectly**.

By Section 594, Code of Alabama, 1923, it is provided that if such statement (mentioned in Section 593) is filed by a committee on behalf of any candidate, there shall **also** be attached to such statement **an affidavit** subscribed and sworn to by said candidate, setting forth in substance that the said statement to the best of **his** knowledge and belief is in all respects true, and that **he** has not **in person** made any expenditures or received any contributions, which are not set forth and covered by said statement. The failure of any committee designated by any candidate to file the statements herein required in the form and at the time specified, is a corrupt practice. **If the statement required to be made prior to such election is not made by any candidate and committee for him, the name of such candidate shall not be placed upon the ballot to be used in such election.**

By Section 595 it is provided that if the statement required to be made **after** such election (see Section 593, *supra*) is not made by any candidate and committee for him, a certificate of election or **nomination** shall not issue to such candidate though he be successful in such election. The failure of **any other political committee** to file the statements required in said corrupt practice law in the form and in the time specified is declared a corrupt practice. The statements required to be filed under the corrupt practice law are public documents and are open to inspection by any citizens.

Other Code Sections define corrupt practice (Sections 596-600 inclusive, Code of Alabama, 1923).

Section 3937, Code of Alabama, 1923, reads as follows:

"Any person or persons who do any act defined or declared to be a corrupt practice **under the election or primary** election laws of this state, or who **wilfully fails** or refuses to do any act required of such person under Article 26 of Chapter 19 of this Code, relating to the corrupt practice law of this state, shall be guilty of a misdemeanor, and, on conviction, must be fined not more than \$500.00, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than six months at the discretion of the court trying the case."

Thus it will be seen that the **doing** of any of the acts forbidden to be done under the corrupt practice law is a misdemeanor **and** that where one **wilfully fails or refuses to do** these things **required to be done** under said corrupt practice law, that person is guilty of a misdemeanor also and punishable as provided in Section 3937 of the Code, supra. Therefore, where a candidate for party nomination in a primary held under the election laws of Alabama, wilfully fails or refuses to file his statements of expenditures as such candidate in the manner and within the time prescribed by law, such candidate is not only ineligible for the nomination and office, even though successful in his efforts at the polls, but is also guilty of a misdemeanor under Section 3937, Code of Alabama, 1923, supra.

You have invited my attention to Section 3946 of the Code of Alabama, 1923, which provides that every candidate for a county office and candidates for the State Senate shall file with the Judge of Probate of the County or counties in which said election is held, a sworn statement, setting out and itemizing the expenses of his canvass in such election **within fifteen days after such** election, and any candidate who fails to so file and swear to such statement within said time, shall be guilty of a misdemeanor, and, on conviction, **must be fined not less than \$100.00, nor more than \$1000.00.**

Section 3946, supra, was Section 6823 of the Code of 1907. Section 3037, Code of Alabama, 1923, supra, is a part of an Act passed in 1915 (General Acts, 1915, p. 250). Section 3937, supra, is the latest law on the subject, and, in so far as Section 3937 is in conflict with Section 3946, then Section 3946 is repealed. Therefore, prosecutions for **wilful failure** on the part of candidates for Representative in the Legislature, and State Senator, to file expense accounts as required by the corrupt practice law, both before and after the primary election, are punishable only as provided in Section 3937, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 29, 1930.

Hon. Hugh L. McElderry,
Treasurer, Alabama Institute for the Deaf & Blind,
Talladega, Alabama.

Alabama Institute for the Deaf and Blind—Board of Trustees cannot legally retire superintendent as Superintendent Emeritus with annual salary for life.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

I have your letter of June 23, 1930, with copy of resolution of the Board of Trustees of the Alabama Institute for the Deaf and Blind enclosed. I find that this resolution contains the provision that: Whereas, F. H. Manning has been connected with the Alabama Institute for the Deaf and Blind for the last thirty-three years, and has served with distinction at a very meager salary; and, whereas, he is now sixty-nine years of age and will soon be entitled to relief from his present duties, it is resolved that he should be retired from active service on July 1, 1929, at a salary of \$1,800.00 per year for the rest of his life. You state that you have been paying said salary to Mr. Manning, but that some question has arisen as to the legality of such act by the Board of Trustees.

You request my opinion:

Did the Board of Trustees of the Alabama Institute for the Deaf and Blind have authority to pass the above resolution providing for an annual salary for Mr. Manning after he was retired from active service as superintendent of the above mentioned institution?

In my opinion the Board of Trustees had no authority to pass said resolution.

Section 577 of the School Code of 1927, provides for the consolidation and incorporation of the Alabama School for the Deaf and the Alabama School for the Blind.

Section 578 of the School Code of 1927, provides that the Alabama Institute for Deaf and Blind shall be managed and controlled by a board of trustees.

Section 581 provides that the trustees shall have authority to select a superintendent for said institute, and shall have authority to fix the salaries for the officers and teachers of said institute.

You will observe from the above provisions of the School Code of 1927, that the Board of Trustees of the Alabama Institute for Deaf and Blind has authority to manage and control said Institute.

Section 98 of the Constitution of Alabama of 1901, contains the provision that the Legislature shall not retire any officer on pay, or part pay,

or make any grant to such retiring officer. What the law prohibits being done directly, it prohibits being done indirectly.

In my opinion the Superintendent of the Alabama Institute for Deaf and Blind is an officer within the contemplation of the above Section 98 of our Constitution, and there can be no doubt that the action of the Board of Trustees in granting him an annual salary after his retirement is without authority of law.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Sheriff,
Selma, Dallas County, Alabama.

Sunday statutory laws—Do not apply to moving picture shows and miniature golf, but are applicable to golf.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 30, 1930. You request my opinion:

1st. Is it a violation of the statutory law of Alabama to operate a moving picture show on Sunday?

2nd. Is it a violation of the statutory law of Alabama to play golf on Sunday?

3rd. Is it a violation of the statutory law of Alabama to play "miniature golf" on Sunday?

The statutory Sunday violations are carried in Sections 5539, 5540, 5541, Code of Alabama, 1923.

In answer to your first question will state that it is not a violation of the statutory law of Alabama for a person to operate a moving picture show on Sunday.

In answer to your second question will state that it is a violation of the statutory law of Alabama (Section 5540, Code of Alabama, 1923), for any person, or persons to play or engage in the playing of golf on Sunday in any public place or any public places where people resort for such purposes. You will note that the play must be in a public place. If the playing is on private grounds, as, for instance, golf links owned and controlled by a country club, then the playing of golf at such place on Sunday is not a violation of Section 5540 of the Code, supra, since such grounds are not open to the general public. In speaking of "golf" as here used I refer to games of regular golf.

In answer to your third question will state that it is not a violation of the statutory Sunday law of Alabama for persons to play or engage in the playing of what is sometimes known as "miniature golf" in any public place or places where people resort for such purposes. This new fashioned game has grown up very recently and might be called by any name other than "golf". As well call a bowling alley a marble game as to call this golf. There is very little similarity between the game called "miniature golf" and regular "golf", and it must be assumed that when the Legislature enacted Section 5540, Code of Alabama, 1923, it had in mind "golf" as then played.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The County Superintendent of Education,
Athens, Limestone County, Alabama.

County Board of Education—No authority to obligate county three mill tax for construction of school building in a city controlled by a City Board of Education.

Opinion by the Attorney General.

Dear Sir:

I have your letter of August 22, 1930; also a letter of July 19, 1930, from the President of the City Board of Education of Athens, Alabama; also letter of August 21, 1930, from the latter; also letter of September 26, 1930, from the latter; also letter of September 26th from you. In the letter of July 19, 1930, from the President of the City Board of Education of Athens, he states it is necessary for the City Board of Education of said city to raise money by issuance of school warrants to complete a high school building in Athens; that they have experienced some difficulty in selling the city school warrants on account of the bond market; that bond buyers have suggested that these warrants be issued by the County Board of Education and secured by the County three mill school tax and that the City Board of Education then pledge to the County Board of Education enough of the special three mill district tax of said city school district to take care of the warrants with interest. In the letter of September 26th from the President of said City School Board, he states that the school building will take care of children both within and without the City of Athens from the outlying territory known as District No. 35 in which District the County Board has no school houses. In your letter of September 26, 1930, you simply call attention to your previous letter of August 22, 1930.

In your letter of August 22, 1930, you propound the following questions concerning which you request my opinion:

1. Can the County Board of Education issue its warrants in the sum of \$25,000.00 to be secured by county wide three mill tax for the purpose

of raising money to assist the City Board of Education of Athens in the erection of a high school building in Athens "to accommodate children both from the City of Athens and also from the territory surrounding the City of Athens known as district No. 35"?

2. Has the County Board of Education the authority to issue its warrants in the sum of \$25,000.00 to be secured by county wide three mill tax and lend the money thus obtained to the City Board of Education of Athens to be used in assisting the City Board of Education in the erection of a high school building in the City of Athens to accommodate the children from the City of Athens and also from the territory surrounding the City of Athens known as District No. 35, under an arrangement with the City Board of Education of Athens that the latter will issue its warrants for the same amount above mentioned payable to the County Board of Education to be secured by the Athens District three mill tax?

3. If the above can be done, then in the event the warrants issued by the City Board of Education are not paid as they mature, would the County Board of Education have the right to withhold from its annual appropriations to the City Board a sum sufficient each year to take care of the unpaid warrant or warrants?

In answer to your first question will state that the County Board of Education cannot issue its warrants against the county three mill tax for the purpose you mention.

In answer to your second question will state that there is no provision of law by which the County Board of Education can issue its warrants against the county three mill tax and lend the money thus under its control for the purposes you mention.

The answer to your questions numbered 1 and 2 makes it unnecessary for me to answer your question numbered 3.

Your attention is invited to Sections 276 and 277 of the Alabama School Code, 1927, to be read in conjunction with Section 203 of said Code. This is the method provided by law for taking care of increased expenses on city schools attended by children surrounding the city.

Section 188, Alabama School Code, 1927, defines "City" within the meaning of the school law. Section 200 of said Code places the legal title to the school property within the city in the hands of the city board of education. By section 203 of said Code, city and county boards of education may reach agreements whereby children in the city may attend the schools in the county and vice versa. By Section 209 of said Code provision is made that, if for any reason, the current income of the city board of education is inadequate to provide ample, appropriate and suitable grounds, buildings and equipment for the city schools, an election for the issuance of bonds on the **credit of the city** may be had. Section 246 of said Code provides that the county board of education shall apportion the funds awarded the county to the several schools under its control **and to cities** having a board of education in the county so as to provide, as nearly as practicable, school terms of equal duration, **taking into consideration all public school funds.**

Section 276 of said Code provides that a school district having a city board of education can be consolidated with territory adjacent to such city school district by calling an election in the manner and form therein provided. When this consolidation takes place the educational affairs of the territory are placed under the control of the city board of education by Section 277 of said Code, but this does not operate to relieve the county board of education of responsibility and liability for the just obligations made prior to such consolidation. The City Board of Education of Athens, Alabama, cannot divest itself of the control of city schools. The legal title to the school buildings and property on which they are erected rests in the City Board of Education and not in the County Board of Education.

On December 17, 1929, I rendered an opinion to the Chief Examiner, Department of Examiners of Accounts, holding that a County Board of Education has no authority to pledge the county three mill tax for the purpose of obtaining money with which to erect a school building in the City of Roanoke. Previous to that I have rendered several opinions to the effect that a County Board of Education cannot use the county three mill tax for the purpose of enlarging a school building owned by individuals who had leased it to the County Board of Education. I know of no provision of law authorizing the County Board of Education of Limestone County to build a school building in the City of Athens, the school system of which and the funds for the operation of which and the title to all school property of which are ultimately under the control of the City Board of Education of said City.

Mr. Malone, in a letter of September 26, 1930, commenting on my opinion of December 17, 1929, above referred to, asked if the City Board of Education of Athens might convey the title to the school property in Athens to the County Board of Education of Limestone County, and thereupon have the County Board of Education of said County issue warrants obligating the county three mill tax to the building or enlarging of the school building. I know of no provision of law to permit this being done.

The County Board of Education is required annually to apportion a reasonable amount of the county three mill tax to the City of Athens. When this is paid over to said city, then the City Board of Education must use it in accord with the law but it cannot anticipate the amount of the apportionment. Where a consolidation of city and outlying territory has been accomplished as provided in Section 276, et seq., of said Code, and a special three mill district tax for a consolidated district has been voted and levied or is being levied, then the City Board of Education may, under Section 281 of said Code, cause the issuance of warrants against the special three mill district tax of said consolidated district for the purpose of making permanent improvements of the nature mentioned in said Section 281 of said Code, and if this is not sufficient, then Section 209 of said Code may be resorted to.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Tax Collector,
Wedowee, Randolph County, Ala.

Tax Assessor—Entitled to commission on interest collections.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your letter of November 29, 1929, addressed to Hon. Chas. E. McCall, Chief Examiner of Accounts, has been referred by him to me for answer.

You state that you have collected a sum of money as interest on some delayed payments of the A. B. & A. Railroad for the years 1921 to 1926, both inclusive.

You wish to be advised:

Whether or not the Tax Assessor for the above years will be entitled to any commissions on the interest collection?

I am of the opinion your question should be answered in the affirmative.

On June 2, 1923, this office rendered an opinion to Hon. W. B. Allgood, State Auditor, (Biennial Report Attorney General 1922-1924, p. 12), which held as follows:

"The Tax Assessor being entitled to commissions on collections, is entitled to commissions on the entire amount collected on the assessment including interest."

The above opinion being based on an Act approved September 15, 1919 (General Acts 1919, p. 282), the Tax Assessor is entitled to commissions on the interest collected for all the above mentioned years. The Act approved September 15, 1919, supra, has not been changed by any subsequent law so as to affect the question now under consideration.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Clanton, Chilton County, Ala.

Public Officers—Bargaining away or bargaining for office of Chief Deputy Sheriff.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 25, 1930. In it you state that, by virtue of Section 10188, Code of Alabama, 1923, the Court of County Commissioners

of Chilton County, Alabama, has fixed the salary of the Chief Deputy Sheriff of Chilton County at \$1500 per year and that this has been the case during the entire term of the present sheriff; that claim has been made each month by the Chief Deputy so appointed, and the warrant has been made payable to said Chief Deputy; that, however, about August 7, 1930, said Chief Deputy published a statement in a local newspaper of Chilton County, wherein he stated that he had only received \$100 per month, the balance of same being turned over by him to the Sheriff. In other words, that the Sheriff of Chilton County has been actually receiving \$25.00 per month out of the Chief Deputy's salary. You enclose with your letter a clipping from the newspaper mentioned carrying what purports to be a public statement of said Chief Deputy to the people of Chilton County and quoting what purports to be a certificate from the present Sheriff of said County to the effect that said Chief Deputy is being paid by said Sheriff the sum of \$100 per month. The printed statement also says that said Chief Deputy is turning over the remaining part of his salary to the Sheriff of said County.

You request my opinion:

1. Is it legal for the Court of County Commissioners to pay said claim of \$1500 per annum to said Chief Deputy under the circumstances above detailed?
2. If the payment of said claim is not legal, who is responsible to the County to repay this money so illegally paid?

In answer to your first question will state that, under Section 10188, Code of Alabama, 1923, it is provided that, in all counties of the State now or hereafter having not more than two hundred thousand inhabitants according to the Federal Census, in which counties the sheriff is not on a salary basis under and by virtue of a Constitutional Amendment, the sheriff of such county **must** have one Chief Deputy. Said chief deputy is an officer under the laws of Alabama.

Andrews v. State, 78 Ala. 483;
Pentecost v. State, 107 Ala. 81.

He is appointed by the sheriff and holds office at the pleasure of the sheriff (Section 10188, *supra*). The Court of County Commissioners fixes his salary upon appointment. Said Court can fix the salary at any amount not less than \$900 nor more than \$1500 per annum (Section 10188, *supra*). The salary is payable only to the chief deputy. The sheriff cannot collect it.

Opinions of Attorney General, 1920-22, p. 475.

Under the foregoing, the Court of County Commissioners has fully performed its duties when it has complied with Section 10188 of the Code, *supra*. The warrants must be drawn in favor of said chief deputy and not in favor of the sheriff.

If the Court of County Commissioners, after having fixed the salary of said Chief Deputy at \$1500 per year, the maximum provided by statute,

ascertains that there is a corrupt agreement between the Sheriff and Chief Deputy to bargain away the compensation of said office to the sheriff in consideration of the appointment, then the Court of County Commissioners may and should withdraw its approval of same.

I invite your attention to Section 5037, Code of Alabama, 1923, which provides as follows:

"Bargaining away and bargaining for office or deputation thereof.— Any person **elected or appointed** to any office, state, county, or municipal, who bargains away such office, or **corruptly** bargains away any **deputation** thereof, or any person **bargaining with** such officer for such office, or **corruptly** bargaining with him for any **deputation** thereof, must, on conviction be fined not less than one hundred nor more than one thousand dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not less than six nor more than twelve months."

Under the foregoing law if the Sheriff of your County and his Chief Deputy have entered into an agreement that the appointment of said Chief Deputy should be in consideration of the latter turning over to the Sheriff any portion of his annual compensation, then both are guilty of a misdemeanor and the sheriff is subject to impeachment for corruption in public office.

An answer to your second question is not necessary in view of what I have said above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

State Superintendent of Education,
Montgomery, Alabama.

1. Schools—Principal can be paid expenses incurred in attending conference called by State Superintendent of Education in Montgomery.
2. Principal cannot be paid for expenses incurred in making trips over county for purpose of soliciting pupils for high school.
3. County Board of Education can make appropriation for purchase of shrubbery for county high school grounds.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 18, 1930. You state that the county high school budget is made up from the following sources:

1. Annual State Appropriation—\$4,500.00.
2. An appropriation from the county board of education.
3. An appropriation from the county board of revenue.

4. Matriculation fees.
5. Library and other special fees.
6. Contributions by the Parent-Teachers Association.

You request my opinion:

1. Can the expense incurred by the principal of a school on a trip to a conference called by the State Superintendent of Education in Montgomery be legally paid by the County Board of Education, and if so from what fund is it payable?

2. If the principal of a school makes trips over the county soliciting pupils for the high school, can he legally be paid by the County Board of Education for such service, and if he can be paid, from what funds shall payment be made?

3. Can the County Board of Education purchase shrubbery for the county high school grounds, and if such purchase can be made, what funds can be used for this purpose?

I am of the opinion your first inquiry should be answered in the affirmative. Section 69, School Code of 1927, provides that the State Superintendent of Education shall call and conduct conferences with principals, or teachers, on matters relating to the condition, needs and improvements of the school. The rule or regulation requiring the conference of teachers is recognized by the law itself to be suitably adapted to the purpose for which public school funds may be expended. The expense should be paid from the Bonus Fund.

Biennial Report of Attorney General, 1924-26, p. 155.

I am of the opinion that your second inquiry should be answered in the negative. I am unable to find any provisions of law authorizing a principal to make trips over the county for the purpose of soliciting pupils. The County Board of Education cannot authorize the principal to make such trips with the understanding that he will be paid for this service from school funds. Public funds cannot be lawfully expended unless there is some express authority for such expenditure, or such authority arises by necessary implication from the provisions of the law.

Brice, County Treasurer, vs. Foshee, 97 So. 764.

Walker vs. Bridgeforth, County Treasurer, 9 Ala. App. 257.

Biennial Report of Attorney General, 1926-28, p. 67.

I am of the opinion your third inquiry should be answered in the affirmative. Section 184 of School Code, 1927, provides how expenditures may be made from the **incidental funds** for the care of school buildings and grounds. The planting of shrubbery would, in my opinion, come within the provisions of the above cited section; providing, however, that the mandate of such section is complied with.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Hayneville, Lowndes County, Ala.

Highway Law—Horns and warning devices.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 29, 1930. In it you request my opinion:

Is it unlawful for one to have on an automobile a triple note Aermore exhaust whistle and use it for the purpose of a warning signal only?

The answer to your question is contained in Section 87 of an Act approved August 23, 1927, (General Acts, 1927, p. 382).

Under said Section of said Act, which Act is known as the "Alabama Highway Code", every motor vehicle when operated upon a highway must be equipped with a horn in good working order, capable of emitting a sound audible under normal conditions for a distance of not less than two hundred feet, but it is unlawful for any vehicle to be equipped with or for any person to use upon a vehicle any siren, or for any person at any time to use a horn otherwise than as a reasonable warning, or to make any unnecessary or unreasonably loud or harsh sound by means of a horn or other warning device. Police, fire departments, and fire patrol vehicles and ambulances used for emergency calls must be equipped with a bell, siren or exhaust whistle of a type approved by the Commissioner.

Under the foregoing Section you will observe that, first, it is essential that, when one operates a motor vehicle upon a highway in this State, it be equipped with a horn in good working order. Operation of a motor vehicle without a horn is a violation of said Section. It is also a violation of the law for an individual other than a peace officer, fire department or fire patrol officer to equip a vehicle with a siren. It is a violation of the law for any person to use a horn otherwise than as a reasonable warning, or to make any unnecessary or unreasonably harsh sound by means of a horn or other warning device. It is not a violation of the laws of Alabama to equip a motor vehicle with an exhaust whistle of the type you mention nor for such individual to use it in the manner you mention.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Commissioner,
Department of Agriculture & Industries,
Montgomery, Ala.

State Chemist—Who is.

- Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of September 27, 1930, calling my attention to Article 221 of the Agricultural Code of 1927.

You request my opinion:

Who is State Chemist?

Section 221 of the Agricultural Code of 1927 is in part as follows:

"221. State Chemist official chemist of Department. The Professor of Agricultural Chemistry of the Alabama Polytechnic Institute, who is State Chemist, shall be ex-officio chemist of the Department of Agriculture and Industries, and shall have supervision over all chemical analyses for the Department, ***."

I construe the above to designate the head of chemistry department, i. e., dean of chemistry, as State Chemist.

I find no law designating a State Chemist except as above set out.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The State Tax Commission,
State Capitol,
Montgomery, Alabama.

License—Cards, dealers in.

Opinion by the Attorney General.

Gentlemen:

I have your letter of May 26, 1930, quoting a letter to the effect that a certain party in Alexander City, Alabama, has invented a card game called "Legionnaire," which is a game based on army officers. You request my opinion:

Are these playing cards within the meaning of the License Schedule of Alabama (Schedule 31, Revenue Laws of Alabama, 1929)?

In answer to your question will state that only persons who are dealers in regular playing cards must pay the license therein required. These are not regular playing cards.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The County Superintendent of Education,
Carrollton, Pickens County, Alabama.

Code—Alabama School Code, 1927—construction of Section 137.

Schools—Extent of use of district tax under Section 137, Alabama School Code, 1927.

District Tax—Use of in discharging obligations or debts and refunding advances—Construction of Section 137, Alabama School Code, 1927.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 10, 1930. You state that in the erection of a school building in Pickensville District No. 39, the amount of local funds and state-aid was insufficient to pay all the bills; that notes were made by the trustees to pay the carpenter who erected the building; that a note of said trustees in the amount of \$63.14 is now outstanding; that the County Board of Education, at a meeting held November 29, 1929, passed a resolution as follows:

"In the matter of district tax paid by colored citizens of Pickensville district No. 39 it was ordered that the sum of fifty dollars (\$50.00) paid by colored taxpayers be paid into the building fund of Pickensville colored school to be used in paying the notes made by colored trustees and other accounts due by the school."

You request my opinion:

Does the law permit the use of the district tax of said district to pay the above mentioned note of the trustees of said school?

An answer to your question depends on whether or not the money was advanced to the County Board of Education by the trustees. This does not appear to be the case and I am therefore of the opinion that there is no authority of law for your paying this note out of the district tax of said district.

The only law on this subject since the adoption of the Alabama School Code of 1927, is Section 137 of said School Code, which is as follows:

"District Tax May Be Used for Building and Equipment.—The respective county boards of education and city boards of education in the

respective counties and cities of the State of Alabama may appropriate and use any district three mill tax that has been or may hereafter be voted in any school district to pay and discharge any obligations or debts which may have been or hereafter are created to build, furnish or equip a public school building for said school district, or to refund money out of the said three mill district tax to any person or corporation who has or may hereafter advance money for such purpose."

Section 137, *supra*, of the Alabama School Code of 1927, was Section 1 of an Act approved August 21, 1923 (General Acts 1923, pp. 144-145), and was carried in the compilation of the school laws of 1924 as Section 111 thereof. The wording of said Section was not changed in the adoption of the Alabama School Code of 1927, which is the first **legal codification** of the school laws of Alabama, all former "school codes" being merely **compilations** of the school laws of the State. The Alabama School Code, 1927, went into effect September 30, 1927. (See Section 1, Act approved August 27, 1927.)

You will observe that Section 137, Alabama School Code, 1927, *supra*, permits the County Board of Education to use the special three mill **district tax** of a particular district, that **has been** or may **hereafter** be voted in the district, to pay and discharge any **obligations or debts** which have been or hereafter are created to **build, furnish or equip** a public school building for the district, or to **refund** money out of said district tax to any **person or corporation** who has or may hereafter **advance** money to **build, furnish or equip** a public school building.

Section 137, *supra*, was first construed on February 13, 1925, in an opinion to the State Superintendent of Education (Opinions of Attorney General, Vol 1, office edition, p. 92). In that opinion it was stated, concerning a sum of money borrowed by certain individuals from another person, that, if the sum borrowed was **donated** by them for the purpose of building the school house in question and the County Board of Education incurred no **obligation** at the time it was received and used, for its repayment, then, such a **donation** could not be considered as an **advancement** for the purpose of building a school house within the meaning of the Act, and the following language was also used:

"To pay money out of the three mill district school tax on matters that are passed, where no legal liability for such payment exists, cannot be said to be expended for the exclusive benefit of the district. Such a use of such tax money would, in my opinion, be expending such money for the benefit of those who had made the donation and not for the benefit of the school district."

The construction of this law again came before the Attorney General on February 21, 1927, in an opinion addressed to the County Superintendent of Education of Marengo County, Alabama (Opinions of Attorney General, Vol. 1, office edition, 1927, p. 249). In that case two notes had been signed by school **trustees** who used the money to pay office debts of a school building of which they were trustees. It was shown that a county board of education

has the power to sue and contract, "all contracts to be made after resolutions have been adopted by the Board and spread upon its minutes." (Section 132, Alabama School Code, 1927.) The appointment, powers, functions and duties of school trustees was then discussed, (See Section 132, School Code, *supra*). The opinion then stated that no power rests in school **trustees** individually or collectively to obligate public school funds which are in the hands of the county treasurer of school funds and that such funds could only be obligated by the County Board of Education, which, through the County Superintendent of Education, is the only authority controlling the schools of the county, empowered to do so. Then, construing Section 137, Alabama School Code, 1927, *supra*, it was held that said Section must be interpreted in the light of the **purpose** for which a district tax has been voted; that if a district tax has been voted for the sole purpose of lengthening the **terms** of public schools in said district, then such tax could not be used for the purpose mentioned in Section 137, *supra*, because this would be devoting the tax to a purpose not authorized by those who voted it. I further stated that Section 137, *supra*, was not intended to authorize county boards of education to pay and discharge any other obligations or debts than those which had been created by the **county board of education**; that the Section was for the relief of county boards of education and not for the relief of individuals and corporations; that the "obligations or debts" were such as have been or might be "created" by the county board of education, and not such as have been or might be created by individuals or corporations; that the authority given the county board of education to refund money out of the district tax to persons and corporations was limited to those cases where money had been advanced; and that the "advance" must have been or must be an advance of money to the **county board of education** and not to individuals or corporations. I further held that said Section does not authorize the county board of education to use the district tax for the purpose of reimbursing persons or corporations for **donations** made toward the erection, repair or equipment of public school buildings. I called attention to the provisions of Sections 2690, 5017, 5018, and 5019, Code of Alabama, 1923, and stated that it is necessary that these Sections be complied with, because it is the duty of a public officer, in the keeping of his accounts, to so keep them that the State Examiners Department may gain knowledge of the actual status and condition of his accounts without reference to extraneous information.

Section 127, Alabama School Code, 1927, *supra*, again came up for consideration in an opinion dated January 14, 1929, to the County Superintendent of Education, Wilcox County, Alabama (Opinions of Attorney General, office edition, Vol. 9, p. 37). In that case a vocational school building had burned, and, in order to rebuild it, several citizens gave their note to a bank for an amount necessary to rebuild. My opinion was requested as to whether or not warrants could be issued against the district tax fund of the district to take up the balance due on the note. I held that warrants could not be issued against a district tax fund except by the county board of education and only in the manner provided by law. I held that the note was not the obligation of the **county board** but the obligation of those who signed it. I stated that

if the persons who borrowed the money from the bank, then advanced to the county board for the purpose of building the school house, the county board might refund the money so advanced out of the three mill district tax after it accrued, to the extent not otherwise specifically obligated, but that there was no provision of law in such a case for the issuance of warrants against such fund. I also stated that if the money in question was given for the purpose, instead of merely advanced, then no refund could be made, since no obligation or debt of the county board existed, and that to refund money under such circumstances would be a gift of public funds by the county board, which is not permissible.

The foregoing are the leading and controlling opinions on this subject.

Unless the money realized on the notes mentioned by you constituted a debt or obligation of the County Board of Education you cannot use the district tax to repay the notes. The best evidence as to whether or not this note is a debt or obligation of the County Board of Education or an advance of money to it, is, first, the minute book at the time of the creation of the obligation or debt, and, second, the ledger sheet of the County Treasurer of School Funds at that time, showing whether or not the money ever came under the control of the County Board of Education to be expended on public warrants drawn by its authority.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Jasper, Walker County, Alabama.

Fees—Probate Judge—Ex officio fees and allowances under Section 7285, Code of Alabama, 1923.

Probate Judge—Local Act for Walker County Board of Revenue construed.

Opinion by the Attorney General.

Dear Sir:

Please refer to your letter of April 8, 1929, (Request No. 1069), also your letter of April 16, 1929 (Request No. 1104), in answer to which latter letter an opinion was written to you by Assistant Attorney General Rayburn under date of May 3, 1929, and concerning which opinion Hon. M. E. Nettles, Deputy Solicitor of Walker County, wrote me for reconsideration on September 19, 1929 (Request No. 1598), and I acknowledged receipt of his letter on September 20, 1929, but no opinion was later written in accord with his request for reconsideration. Whereupon, he wrote me again January 1, 1930, referring to his previous communications, to which there was no answer by

the office. Please also refer to your letter of April 15, 1930, enclosing copy of opinion of Assistant Attorney General Rayburn heretofore mentioned and also copy of an opinion by Mr. Nettles to you dated May 11, 1929. In your letter of April 15, 1930, you refer to your previous communications on the subject of your inquiry and ask for an opinion thereon.

The substance of all of these letters is this:

The returns of your office net you more than \$5,000.00 per year. A Local Act was passed by the Legislature in 1927 (Local Acts, 1927, p. 394), abolishing the Court of County Commissioners of Walker County, creating in lieu thereof a Board of Revenue composed of four members and the Judge of Probate as an ex officio member and chairman thereof, placing the identical duties of the former Court of County Commissioners upon the newly created Board of Revenue, and not placing any new and additional duties upon it, and by Section 8 of said Act fixing the salary of the members at \$2400.00 per annum, and the salary of the Probate Judge, as chairman and ex officio member, at \$1200.00 per annum.

Upon this statement of facts you request my opinion:

1. Under Section 7285, Code of Alabama, 1923, am I, as Judge of Probate, legally entitled to ex officio fees in the amount of \$400.00, under the following schedule:

"All other official duties, for the compensation of which no expressed provision is made by law, such sum as may be allowed by the Court of County Commissioners to be paid out of the County Treasury not exceeding per annum.....\$400.00".

2. Am I, as Judge of Probate, entitled to fees for road services not exceeding \$400.00 under the following Schedule of Section 7285, supra:

"Discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, annually, to be paid out of the County Treasury, not exceeding\$400.00".

3. Does the Local Act, supra, abolishing the Court of County Commissioners and creating in lieu thereof a Board of Revenue with no new duties placed upon it, by allowing me a salary of \$1200.00 per year as ex officio member and chairman thereof, affect the allowances mentioned in questions one and two?

4. Am I entitled to fifteen cents per hundred words, under Section 7285, supra, for recording the minutes and proceedings of the Board of Revenue?

5. What is the statute of limitations on presenting a bill to the County, if you hold that I am entitled to either of the above items for ex officio services?

In answer to your first question will state that, during that term of office in which you were serving at the time of the passage of the Local Act, supra, you were entitled to receive a sum not to exceed \$400.00 for all official duties, for the compensation of which no express provision was made by law. During your new term of office after the passage of the Local Act, supra, you

would be entitled to draw the salary of \$1200.00 per annum, as ex officio member and chairman of the Board of Revenue. In addition, you would be entitled to draw a sum, not to exceed \$400.00 per annum, under Section 7285, supra, for all other official duties for the compensation of which no expressed provision is made by law, all accounts or claims for same to be presented and to be in the form and manner provided by Section 7265 of the Code, supra.

In answer to your second question will state that you are not entitled to \$400.00 for ex officio services in discharging your duties in relation to public roads of your county, if your net annual compensation exceeds \$5000.00. You will observe that it is provided in Section 7285, supra, with regard to this Schedule, as follows:

"But this shall not apply to any Probate Judge who receives net annual compensation from his office exceeding \$5000.00."

In answer to your third question will state that neither you nor any member of the Board of Revenue could draw the salary mentioned in said Local Act during the term of office in which you were serving at the time it was passed, for this would violate the provisions of the Constitution of Alabama by increasing the salary, compensation, fees or allowances of a public officer during his term of office.

In answer to your fourth question will state that under Section 7285, Code of Alabama, 1923, you were entitled to fifteen cents per hundred words for recording the minutes and proceedings of the Board of Revenue during the term of office in which you were serving at the time of the passage of the Local Act, supra, but not during the term of office in which you are now serving for the reason that the compensation provided under the Local Act is in lieu of this and is in full for all services you perform in connection with said Board of Revenue.

In answer to your fifth question will state that the statute of limitations pertaining to the presentation of claims to the County is one year.

Section 228, Code of Alabama, 1923.

The opinion of May 3, 1929, by Assistant Attorney General Rayburn, in answer to your letter of April 16, 1929, is hereby withdrawn and declared to be null and void.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The State Tax Commission,
CAPITOL.

Taxation—Registration of Securities. Securities owned by citizens of Alabama, but held in trust without the State, not subject to taxation and registration under Sections 44-52 of an Act approved July 22, 1927 (Acts 1927, p. 139).

Opinion by Assistant Attorney General Cobb.

Gentlemen:

I have your letter of recent date in which you state:

In the administration of Sections 44-52 of House Bill 359 approved July 22, 1927, we have had several inquiries as to whether or not securities which are placed in a trust and located in another state, but which trust is owned by a citizen of this state, would require registration to obtain exemption from ad valorem tax.

One person has stated his question as follows:

"Suppose a citizen of the State of Alabama creates a trust we will say in the State of New York and places with it the stocks of foreign corporations. Are those stocks subject to this tax or should they be subject to the tax laws of the State of New York?"

Another question which is very similar but may result in a different legal status of the property in question was as follows: A resident of another state died and by will created a trust which consisted of taxable securities and named as the beneficiary of said trust a resident of the State of Alabama. Under these circumstances, should the beneficiary of said trust fail to register such securities, could the securities be assessed for ad valorem tax in this state, the trust and trustee being located in another state?

You request my opinion in answer to the above question.

The substance of Sections 44 to 52, inclusive, of the Act of 1927, pp. 174 to 176, is that securities of foreign corporations may by the owner be registered in the office of the State Tax Commission upon payment of the privilege tax therein specified, and that no ad valorem tax shall be assessed or collected upon any security so registered.

The determinative question involved in your inquiry is this: Are securities owned by a citizen of this State, but held in trust without the State by another, taxable in any event? The Supreme Court, in the case of the State v. Tennessee Coal, Iron & Railway Co., 188 Ala. 524, had this to say:

"The situs of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the place of residence of the owner; the only exception being where the property is employed in business, or is in the hands of an agent of the owner having an actual situs different from the domicile of the owner.

It is not necessary, therefore, that the owner should reside within the State, to render his personal property, situated within the State, liable to taxation." Citing *Boyd vs. Selma*, 96 Ala. 144, 150.

It is my opinion that the situation outlined in your letter falls within the exception to the general rule; and that the situs of securities held in trust in the State of New York for the owner who resided in Alabama, for purposes of taxation would be in the State of New York. This conclusion is fortified by the statutory definition of "owner" set out in Section 44 of the Act under consideration, viz: "The word 'owner' as herein used, shall include as well, brokers and parties holding or claiming title to any securities in a fiduciary capacity."

And, in *State v. Beardsley*, 77 Fla. 803, 82 So. 794, it is held that a trustee, for the purposes of taxation, is the owner of the property, and that such property is taxable against the trustees at the domicile of the trustee.

It is, therefore, my opinion that securities of foreign corporations owned by a citizen of the State of Alabama, but held in trust without the State are not subject to ad valorem tax and do not come within the provisions of Sections 44-52 of an Act approved July 22, 1927 (Acts 1927, p. 139).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Centerville, Bibb County, Alabama.

Court of County Commissioners—may employ clerical assistance in regard to roads, bridges, ferries, etc.

Opinion by the Attorney General.

Dear Sir:

I have your letter of February 25, 1930, in which you request my opinion:

Can the Court of County Commissioners employ a clerk for said court and fix a reasonable monthly salary for such clerk?

I am of the opinion that the Court of County Commissioners has authority to employ such clerical assistance as may be needful or necessary to carry out the provisions of Section 157 of an Act approved August 23, 1927, (General Acts 1927, p. 391), which Section is a reenactment of Section 1347, Code of Alabama, 1923. Section 1347, Code of Alabama, 1923, was originally Section 5765, Code of 1907 and was amended by Section 1 of an Act approved Sept. 22, 1915, (General Acts 1915, p. 573), and, as so amended was codified in the Code of Alabama, 1923, and as codified was reenacted as Sec-

tion 157 of an Act approved August 23, 1927, supra, known as "The Alabama Highway Code." This Section has been construed to authorize the Court of County Commissioners to employ such clerical help as may be needful or necessary to carry out the provisions thereof.

Opinions of Attorney General 1918-20, p. 230.

Opinions of Attorney General 1924-26, p. 286.

Opinion of Attorney General of Jan. 6, 1930, to Judge of Probate, Butler County, Ala.,

but it has been held that this Section does not authorize a Court of County Commissioners to employ a patrolman to enforce its traffic regulations.

Opinion of Attorney General, July 8, 1929, to Board of Revenue and Road Commissioners of Mobile County.

It must be understood, however, that the clerical assistance authorized to be employed as aforesaid and paid for out of county funds, is strictly in regard to the duties mentioned in the Act.

It is the duty of the Judge of Probate to record the proceedings of the Court of County Commissioners, make all necessary orders and issue all process necessary to sustain its jurisdiction, or maintain its authority.

Section 6763, Code of Alabama, 1923.

Where the Probate Judge is absent and where the Court of County Commissioners is held without the attendance of the Probate Judge, a special clerk must be appointed for such term who must be paid by the Judge of Probate.

Section 6744, Code of Alabama, 1923.

The Court of County Commissioners is a court of record and as such the Judge of Probate is designated as the one to record its proceedings, etc.

Sections 6748, 6763, Code of Alabama, 1923.

So that, while the Court of County Commissioners may employ necessary clerical assistance to carry out the provisions of Section 157 of the Act approved August 23, 1927, supra, this does not permit the court of county commissioners to employ a clerk at the expense of the county to perform those duties devolving upon the Probate Judge under Section 6763, supra, nor does it permit the court of county commissioners to employ clerical assistance at the expense of the county to perform duties of the Probate Judge in the event of a situation such as is mentioned in Section 6762, supra.

In connection with this opinion, see opinion of August 12, 1929, to the Chief Examiner of Accounts.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Clerk of the Circuit Court,
Ashland, Clay County, Ala.

Circuit Clerk—Fees of when acting as ex officio clerk of the county court.

Circuit Clerk—As ex officio clerk of county court does not approve appeal bonds on appeal to circuit court.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 5, 1930. It appears that you are ex officio clerk of the County Court of Clay County.

You request my opinion:

(1) As clerk of the county court am I required to approve the bond in appeal cases from the county court to circuit court?

(2) If so am I entitled to the same fee as in a case appealed from the circuit court to the court of appeals or Supreme Court of Alabama?

(3) In preparing a transcript of the proceedings in the county court when a case is appealed from the county court to the circuit court, am I, as ex officio clerk of the county court, entitled to fifteen cents per hundred words for making out the transcript on appeal?

In answer to your first question will state that you do not approve appeal bonds in cases appealed from the county court to the circuit court. The judge of the county approves the bond.

Section 3837, Code of Alabama, 1923.

An answer to your second question is unnecessary in view of my answer to your first question.

In answer to your third question, I am of the opinion that you are entitled to fifteen cents per hundred words for making the transcript in a case appealed from the county court to the circuit court. This is provided for in the schedule found in Section 3739, Code of Alabama, 1923.

You, of course, are aware that the transcript contains only the affidavit, warrant, **appearance** bond and the order of the court.

The opinion of September 29, 1930, written by Assistant Attorney General Haynes to you in answer to your letter of September 5, 1930, on the foregoing, is withdrawn and this opinion is substituted in lieu thereof.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

The Tax Assessor,
Chatom, Washington County, Ala.

Taxation—Oil and Gas leases subjects of.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter enclosing therein letter of the Gulf Refining Company of Louisiana.

You request my opinion:

Are oil and gas leases subjects of taxation?

I am of the opinion they are. Sub-division (a) of Section 5 of an Act approved Sept. 15, 1919 (General Acts, 1919, p. 282) in setting out the subjects of taxation provides:

"a. Every piece, parcel, tract or lot of land in this State, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral, the right to mine minerals; timber and the right to turpentine, or other interests when such interests are owned by persons other than the owner of the surface or soil, except growing crops."

In an opinion rendered on June 25, 1928, to the Judge of Probate, Lamar County, Alabama, I held that an instrument conveying the right to operate for oil and gas and of doing on said land whatever is necessary for such purpose, was a deed or instrument in the nature of a deed and conveyed an interest in the land.

Biennial Report Attorney General, 1926-28, p. 621.

Milliken v. Faulk, 111 Ala. 658.

Since oil and gas leases convey an interest in the land they are subject to taxation under sub-division (a) of Section 5 of an Act approved Sept. 15, 1919, *supra*.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Monroeville, Monroe County, Alabama.

Court of County Commissioners—Cannot pay for electric fan for Probate Judge's office.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of August 11, 1930, in which you wish to be advised if the county can pay for an electric fan for probate or clerk's office.

I am of the opinion that your question should be answered in the negative. It is a well established rule of law that money cannot be expended by the county unless there is a direct statute authorizing such expenditure, and I have been unable to find any law authorizing the county to purchase electric fans for any of the county offices.

In reaching this conclusion I am mindful of sub-section 3 of Section 231, Code of Alabama, 1923, which provides for the purchase of certain things for the use of various county offices, viz., "Claims for necessary stationery, office supplies including typewriters and supplies for the office of judge of probate, clerk and register and court reporter."

The Court of Appeals of Alabama prior to the amendment of 1923 (which amendment specifically included typewriters) held that typewriters were not considered "necessary supplies" within the meaning of the above section, and in the opinion so holding said:

"In efforts to render judgments in accord with their idea of justice, courts of last resort have rendered many freak opinions. Often these opinions give to words and phrases entirely foreign to the etymology of the words, or to what they were commonly understood to mean. But, even to enforce the payment of a just demand, there is a limit beyond which courts cannot go. In construing statutes, the general rule is that the words are to be taken in their ordinary and popular sense, unless it plainly appears from the context that they are used in different sense."

Underwood Typewriter Co. v. Marengo County Bank, 17 Ala. App. 47, 81 Sou. 543.

If typewriters are not considered necessary supplies, I cannot by the farthest stretch of my imagination construe subsection 3 of Section 231, supra, as to include electric fans. If the Legislature had seen fit for the county to furnish the various county offices with electric fans, it would have included same in the above section by an amendment as was done in the case of typewriters.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Tax Collector,
Tuscumbia, Colbert County, Alabama.

Taxation-ad valorem—payment of—liens.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of March 18, 1930. You request my opinion:

"A" owned a lot on which was situated a store. Since the making of "A's" assessment his store and stock of goods were burned. "A" sold the real estate to "B". "A" has gone to another County. Can "B" pay the tax on the real estate or is the real estate obligated to pay the tax on the personal property, i. e. stock of goods?

In answer to your question, I am of the opinion that you will first have to exhaust the personal property of "A", if any, before the real estate can be sold for the satisfaction of the taxes due and assessed by "A". If "A" has left the State and has no personal property, then the real estate so assessed by "A" must be sold for the satisfaction of the taxes due, notwithstanding the fact that "B" has purchased the same.

Section 3059, Code of Alabama, 1923.

The cited section of the Code provides that the real estate can be subjected to the payment of the taxes after the personal property has been exhausted, and it necessarily follows that if the party who assessed the real estate for taxation has no personal property, then the State has a lien upon the real estate for the taxes due, notwithstanding the sale thereof.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Superintendent of Insurance.
CAPITOL.

Code Section 8379—Construction of.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of recent date in which you request my opinion:

Does Section 8379 of the Code of Alabama, 1923, mean that an agent representing a fire insurance company in this State must **actually write** the policy or can said agent take the application of the person desiring insurance, report same to his company and have the policy written by

anyone in the office and return to said agent for countersigning and delivery?

Considering this Section in answer to your inquiry, I am of the opinion that said Section does not necessarily mean that the agent must **actually write** the policy. The matter of actually writing the policy is one of mere routine in the office and can be done by any clerk. Insurance agents regularly commissioned by the home office can take the application of any person desiring insurance and thereby bind the company and let the actual writing of the policy be done by any clerk in the office. The agent simply countersigns the policy and has the same delivered to the insured.

Section 8379, *supra*, reads as follows:

"8379. Foreign companies doing business here must contract through local agents; exception.—Fire, fire marine, and marine insurance companies not organized under the laws of this State, but legally authorized to do business in this state through regular commissioned agents located in this state, shall not make contracts of fire, fire marine and marine insurance on property herein save through agents of such companies regularly commissioned to write policies or certificates of fire, fire marine, or marine insurance in this state; but this article shall not apply to such companies covering the actual property of railroad companies doing directly a transportation business over its own line beyond the limits of this state."

You will note that the above section prescribes the manner in which the foreign insurance companies shall transact business in this State. It prescribes that said companies shall not make contracts of fire, fire marine, and marine insurance on property herein save through agents of such companies legally commissioned to write policies. Regularly commissioned insurance agents representing the foreign insurance companies designated in the above quoted section are authorized under this section to bind the company they represent and the mere matter of actually writing the policy is one of office detail. In the case of *Insurance Company of North America vs. Thornton* (130 Ala. 222) it is held that duly appointed agent of a licensed insurance company has power to appoint necessary subagents and the principal will be bound by their acts.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Superintendent,
Bureau of Insurance,
State Capitol,
Montgomery, Alabama.

Taxation—Premium Tax on Domestic Insurance Companies.

Opinion by the Attorney General.

Dear Sir:

Please refer to your letter of February 25, 1929, and also your letter of April 23, 1929, concerning the premium tax payable by domestic insurance companies under sub-division (d) of Sub-section (b) of an Act approved July 22, 1927, *supra*.

You request my opinion:

1. Does the provision of sub-division (d) of Sub-section (b) of an Act approved July 22, 1927, (General Acts 1927, p. 153), relating to premium tax payable by domestic insurance companies, require that such domestic insurance companies, in paying the premium tax, be given credit for the same loans made by them from year to year, so long as the mortgages referred to in said law exist?

2. Does the deduction, mentioned in the aforesaid Act allow domestic insurance companies in paying premium tax provided in said Act, to include bonds purchased by it where the mortgages securing such bonds are not made to the domestic insurance company but are made to someone else?

3. For the purpose of ascertaining the correct amount to be deducted each year, am I authorized to require each domestic insurance company, claiming a deduction, to furnish me with a statement of premiums, and itemized list for which deductions are claimed, giving the name of mortgagor, name of mortgagee, amount of mortgage debt secured, date of execution of mortgage and when it matures?

Without passing on the constitutionality of the Premium Tax law upon which judgment is reserved, in answer to your first question will state that whatever outstanding loans the company has made in Alabama and which the company has of December 31st preceding the report, which are secured by mortgages to it, on Alabama real estate and upon which mortgages the recording privilege tax has been paid, must be deducted.

In answer to your second question will state that for a domestic insurance company, in paying the premium tax, to be entitled to the deduction of loans, the following conditions must exist; the loan must have been made by the company in this state, secured by an existing mortgage which must have been made to the insurance company and not to someone else and the mortgage must be on real estate located in Alabama and must have been recorded in Alabama and the privilege tax for recording the mortgage must have been paid. All of such facts must exist or no deduction is allowable.

In answer to your third question will state that you should require all the information which is necessary in order that you may know what deductions are proper to allow.

The opinions addressed to you under date of March 2, 1929, and March 3, 1930, respectively, are hereby withdrawn and you are requested to return same to me.

Sometime after the rendition of the opinion of March 3, 1930, which dealt only with the premium tax on domestic insurance companies and deductions allowable, the attorneys for the Protective Life Insurance Company of Birmingham, Alabama, addressed a letter to this office under date of March 18, 1930, citing the language of Section 54 of an Act approved July 22, 1927, (General Acts 1927, p. 176,) relating to the franchise tax payable by foreign corporations and the deductions allowable to such foreign corporations in the payment thereof, and a supposed interpretation of the deduction clause therein in support of the argument of said attorneys, that the language of the deduction clause being practically the same, the interpretation placed on the language of the deduction clause of Section 54, supra, should be applied to the language of the deduction clause of sub-division (d) of sub-section (b) of said Act, in the computation of the premium tax payable by domestic insurance companies.

Section 54, of the Act approved July 22, 1927, supra, reads as follows:

"Section 54. That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars, (\$2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State, the aggregate amount of loans of money made by such corporation in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

The attorneys said the following with regard to Section 54, supra,

"* * * * Bear in mind that during all of the years that foreign corporations have been entitled to take this deduction in the ascertainment of franchise taxes to be paid by them, it has never been suggested that consideration should be given only to loans made by them during the year in question, but it has always been understood that the statute meant exactly what it says, namely, that the aggregate amount of loans secured by existing mortgages should be deducted."

You will observe that, in answer to your first question, I have taken the position that whatever outstanding loans the domestic insurance company has made in Alabama, and which the company has as of December 31st pre-

ceding the report, which are secured by mortgages to it, on real estate in this State, and upon which mortgages the recording privilege tax has been paid, must be deducted. This differs from the opinion of March 3, 1930, *supra*, which has been recalled, but confines the deductions to loans made by the company, which are secured, not by mortgages made to anyone, but mortgages made to the company.

As regards Section 54 of the Act, *supra*, relating to the deductions allowable to foreign corporations in the payment of their franchise taxes, the reasoning is faulty because, by an opinion dated February 28, 1923, to the State Tax Commission (Opinions Attorney General, 1922, 1924, p. 42), in construing the identical language of Section 54, *supra*, in Section 16 of the Revenue Act of 1919, with regard to the deduction therein specified, it was stated that:

"This attempted exemption is clearly contrary to the mandate of the Constitution and is, in our opinion, void."

Section 232, of the Constitution of Alabama, 1901, reads as follows:

"232. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the State. The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, **but such franchise tax shall be based on the actual amount of capital employed in this State.** Strictly benevolent, educational or religious corporations shall not be required to pay such a tax."

This Section of the Constitution was construed by our Court of Appeals and the opinion was approved by our Supreme Court in the case of *Elba Bank & Trust Company*, 91 S. 917, where it was held that the Revenue Act of 1911 and the Act of 1915, attempting to exempt banks and building and loan associations from the payment of the franchise tax was void and that the Acts must be construed just as though the provision exempting banks and building and loan associations had not been written into the law, for the reason that the Constitution named the only exemptions that could be allowed, viz. strictly benevolent, educational or religious corporations.

The statute cannot say what shall and what shall not be considered capital employed in the State, nor can it say that certain kinds of capital employed in the State by a foreign corporation shall be deducted in ascertaining the amount of capital employed in the State upon which the franchise tax shall operate, for, if so, then the legislature would be doing by very slight indirection what the Supreme Court said in the foregoing decision it could not do directly.

Section 232, *supra*, is a mandate of the Constitution. By Section 54 of the Act approved July 22, 1927, *supra*, the legislature undertook to carry into effect this constitutional mandate, but, after providing for such a franchise

tax in strict accordance with the Constitution, in the first sentence of said Section 54 of said Act of 1927, it undertook in the second and last sentence of said Section to exempt from the operation of the statute, as capital employed in this State, "the aggregate amount of loans of money made by such corporations in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law." This attempted exemption is clearly unconstitutional and void, as violative of Section 232, Constitution of Alabama, 1901. Nor does the fact that said attempted exemption is unconstitutional and void, vitiate the first sentence of said Section 54 of said Act of 1927.

Opinions Attorney General 1922-1924, pp. 44-45, (See also Opinions Attorney General, 1922-23, pp. 121, 122, 123).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Deed Filing Tax—None required on option.

Deed Filing Tax—Required on long term lease.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

I have your letter of March 20, 1930, enclosing therein two letters from Mr. John C. Curry, Assistant to State Tax Commission, calling your attention to certain conflicting opinions of this office construing Section 21½ of an Act approved July 22, 1927 (General Acts, 1927, p. 139). These opinions being relative to the taxability of instruments conveying (1) options, (2) long term leases.

This is to advise you that I have carefully reconsidered the opinion rendered by me on February 12, 1930, to the Judge of Probate, Walker County, (Opinions Attorney General, Book 16, p. 161, office edition) together with an opinion rendered by this office on June 26, 1925, to Chas. E. McCall, Chief Examiner of Accounts, (Opinions, 1924-1926, p. 165) and I am of the opinion that the opinion rendered by me on February 12, 1930, supra, holding that no deed filing tax is required on instrument conveying purely an option, is correct. That part of the opinion rendered on June 25, 1925, supra, which is in conflict with said opinion rendered February 12, 1930, supra, is hereby withdrawn.

I have also reconsidered the opinion rendered by me on February 24, 1930, to the Judge of Probate, Jackson County, Ala., (Opinions Attorney

General, Book 16, p. 222, office edition) together with opinion rendered on May 13, 1927, to Judge of Probate, Lee County (Opinions Attorney General, Biennial Report, 1926-1928, p. 183) and I am of the opinion that the opinion rendered on May 13, 1927, holding that a deed filing tax is required on an instrument conveying a long term lease, is correct. The opinion rendered on February 24, 1930, *supra*, is hereby withdrawn.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

The Superintendent of Banks,
CAPITOL.

Banks—Bills receivable—Section 3973, Code of Alabama, 1923—Construction of.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of Feb. 17, 1930, inviting my attention to Section 3973, Code of Alabama, 1923. You request my opinion:

Is it legal, under the Banking Laws, for a bank to put up part of its assets to secure deposits from public officers, that is to say, can a bank use part of its bills receivable or bonds in order to secure from public officers deposits as contemplated by Section 3973, of the Code?

Before answering your question, it is necessary that I ascertain what are bills receivable and what forms of security they may be considered under the Negotiable Instrument Law.

Bills receivable have been defined to be "a debt due for goods sold."—*Rogers v. Abbott*, 92 S. E. 472.

Bills receivable also include mortgages and notes on both real and personal property and are used under the Negotiable Instrument Law, as collateral security. It is a matter of common knowledge that a great many banks have failed in Alabama and their failure has been attributed to "frozen assets," that is to say, mortgages and notes that could not be realized upon.

I am not unmindful of Section 6421 of the Code of Alabama, 1923, which provides:

"Bonds of federal land bank and joint stock land bank security for public funds.—For the purpose of promoting and encouraging agricultural production by providing cheap money for the farmer by the sale of farm loan bonds issued under the provisions of the federal farm loan act by the federal land banks and also by those joint stock land banks having their principal place of business in Alabama created under said

federal farm loan act; said bonds so issued by federal land banks and also by those joint stock land banks having their principal place of business in Alabama, are designated as security for all character of public funds, especially for securing deposits by designated depositaries for the funds of the State of Alabama and of the various counties, municipalities and districts of Alabama."

The legislature has failed to define "good and sufficient security" to secure the payment of funds deposited under Section 3973 of the Code of Alabama, 1923.

The exception in that Section appeared for the first time in the Code of Alabama, 1923, and there are no opinions by the Supreme Court on it. That exception is as follows:

" * * * * but none of the officers herein named shall be criminally liable under the provisions herein contained for depositing the revenue of the State or county, or any money paid into his office or received by him in his official capacity in a bank if the officer making the deposit in good faith requires and takes from the bank at or before the deposit, good and sufficient security to secure the payment of the funds deposited."

This Section does not permit a bank to put up as collateral security its bills receivable to secure the officer so depositing public funds. Neither does it permit the bank to put up any security whatsoever. It simply provides that the officer therein named shall not be punished criminally, who, in good faith takes from the bank at or before making the deposit good and sufficient security to secure payment of the funds deposited.

The legislature not having permitted a bank to put up bills receivable or any securities other than those mentioned in Section 6421 of the Code, supra, and to hold that a bank could use only bonds of the Federal Land Bank and those of the Joint Stock Land Banks having their places of business in Alabama, as security for all character of public funds, is an injustice to the State of Alabama, and I believe that, under that Section, banks should be permitted to use bonds of the State of Alabama as well.

Answering your question in the inverse order, I am of the opinion that a bank cannot use its assets, i. e., bills receivable, in order to secure deposits from public officers under Section 3973 of the Code of Alabama, 1923. However, I am of the opinion that, in addition to the bonds mentioned in Section 6421 of the Code of Alabama, 1923, banks may put up as security the bonds of the State of Alabama to secure deposits from public officers named in Section 3973 of the Code, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

State Tax Commission,
CAPITOL.

Attention Hon. John S. Mooring.

Jitney buses—operation and distance. Act approved August 25, 1927
(General Acts, 1927, p. 382) construction of.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of July 14, 1930 relative to the length of route provided for the operation of jitney busses under the Act approved July 25, 1927. You invite my attention also to Subsection (c) of Section 14 of the Act approved September 13, 1923 (General Acts of Alabama, 1923, p. 284).

You request my opinion:

Whether Subsection (c) of Section 14 of the Acts of 1923 is to be construed as it is read or as amended by the substitution of fifteen miles in the place of ten miles under the Act approved August 25, 1927, (General Acts, 1927, p. 382)?

In answer to your question, I am of the opinion that Subsection (c) of Section 14 of the Act approved September 13, 1923, (General Acts, 1923, p. 284) is to be construed in *pari materi* with the Act approved August 25, 1927 (General Acts, 1927, Section 2, p. 382).

The legislature being aware of Subsection (c) of Section 14 of the Acts of 1923, *supra*, as to the distance traveled by jitney buses, i. e., ten miles, simply increased the distance to fifteen miles and that that was the legislative intent there can be no doubt.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Circuit Clerk and Ex Officio Clerk of the Inferior Court of Tuscaloosa County,

Tuscaloosa, Tuscaloosa County, Alabama.

Clerk's commission on money paid into the State and County Treasury.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letters of February 4, 1929, and of March 27, 1929, both of which are dealing with the same matters which are substantially as follows:

That you are clerk of the Circuit Court of Tuscaloosa County, and as such you are ex officio Clerk of the Inferior Court of Tuscaloosa County. That you as Clerk of the Circuit Court and ex officio Clerk of the Inferior Court of Tuscaloosa County, collect certain fees and costs that are paid into the State and County Treasury, viz: solicitors' fees, witnesses' fees, stenographers' fees and trial tax.

You request my opinion:

1. Am I as Clerk of the Tuscaloosa Circuit Court entitled to commissions of five per cent on witnesses' fees and stenographers' fees collected by me in said court?

2. Am I as Circuit Clerk of Tuscaloosa County acting as ex officio Clerk of the Inferior Court of Tuscaloosa County, entitled to a commission of five per cent on solicitors' fees and trial tax or court fees collected by me in said court?

3. Am I as Circuit Clerk of Tuscaloosa County entitled to a commission of five per cent on solicitors' fees, witnesses' fees and court fees collected by me in cases appealed from the Inferior Court of Tuscaloosa County, where a conviction is had, and fine and costs paid?

Before attempting to answer the above request I find it necessary to examine the Act approved August 3, 1927, (Local Acts, 1927, p. 130) which Act creates the Inferior Court of Tuscaloosa County, and abolishes the statutory County Court of Tuscaloosa County, Alabama. This Act abolishes the statutory County Court of Tuscaloosa County, and confers on the Inferior Court herein established all the powers and jurisdiction of the Justice Court, as well as that of the County Court herein abolished.

Section 4 of the Act, supra, provides, among other things, "that the Circuit Clerk of Tuscaloosa County shall act and be clerk of the Inferior Court hereby established * * * ." In another paragraph of this section it goes on to provide as follows: " * * * In all other criminal cases the same costs, fines and the same fees for the services of the Solicitor, Clerk, and the sheriff and witnesses in said Court shall be assessed and collected as are now provided by law to be assessed and collected for such offenses in the County Court of Tuscaloosa County, Alabama, except that the trial tax in all criminal cases shall be \$3.00 in each case and the trial tax in all civil cases shall be \$1.00 in each case."

Section 3803, Code of Alabama, 1923, provides that the clerks of the circuit courts of the several counties of the State are made *ex officio* clerks of the county courts of the respective counties. Section 3804, Code of Alabama, 1923, provides that the fees and compensation of said clerks for their duties as clerks of the county courts, shall be the same as now allowed by law to the clerks of the circuit courts in criminal cases, and shall be paid in like manner. The circuit clerk acts as *ex officio* clerk of the Inferior Court of Tuscaloosa County, and is charged with the same duties and receives the same compensation in like manner as the circuit clerk, when acting as clerk of the county court, and is entitled to all the fees and costs which are now allowed clerks of the county courts of the various counties.

Therefore, answering your first inquiry will say I know of no provision of law that gives you five per cent commission on witnesses' fees collected by you as clerk of the Tuscaloosa Circuit Court in cases that have been appealed from the Inferior Court of Tuscaloosa in which convictions are had and are finally disposed of in the Circuit Court. The fees of witnesses in both the Circuit Court and the Inferior Court of Tuscaloosa County go direct to the witnesses themselves unless otherwise provided by a local act, and I find no such local act pertaining to either the Circuit Court of Tuscaloosa County or the Inferior Court of Tuscaloosa County. Therefore, subsection 16 of Section 6724, Code of Alabama, 1923, does not apply to such fees. This subsection reads as follows:

"16. To render to the county treasurer, court of county commissioners, or board of revenue, within thirty days after each term of the court, a statement in writing and under oath, of the fines assessed and forfeitures obtained during such term, the amount of each, and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deduction from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds."

It is my opinion that you are entitled to five per cent commission on all fees of court reporters collected by you and paid into the county treasury under Section 6738, Code of Alabama, 1923. You are entitled to this under subsection 16, supra. I think this subsection clearly provides for this five per cent commission where it says: "* * * and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and after deducting from such amount five per cent for their compensation."

Answering your second request, will say that you are entitled to a commission of five per cent on solicitors' fees and trial tax where they are collected and paid into the county treasury under subsection 16, supra.

Opinions of Attorney General, Book 12, pp. 77, 95 (office edition).

Answering your third request, will say that you are entitled to five per cent commission on all solicitors' fees collected by you as clerk of the Circuit Court and also Clerk of the Inferior Court of Tuscaloosa. As Clerk of the Circuit Court you are entitled to those commissions under Section 5518, Code of Alabama, 1925, when paying the same to the State Treasurer. You are entitled to five per cent commission on all solicitors' fees paid into the county treasury by you as ex officio Clerk of the Inferior Court of Tuscaloosa.

Opinions of Attorney General, 1929, Book 12, pp. 77, 95 (office edition).

In my answer to your first question, I have answered that part of request three which pertains to witnesses' fees.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Huntsville, Madison County, Ala.

Automobile tags—Transfer of.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of June 23, 1929, in which you state that a good many people think that a copy of the transfer of automobile tags should be furnished them by the judge of probate.

You request my opinion:

1. Am I, as Judge of Probate, required to execute and deliver to the transferee of an automobile tag a certificate that there has been a legal transfer made of said tag?
2. Or do I merely make a record of the transfer?

In answer to your first question, I am of the opinion that you do not have to furnish a certificate of the transfer of automobile license tags to any person.

Section 12 of an Act approved September 3, 1923, (General Acts, 1923, p.284).

Biennial Report of Attorney General, 1926-1928, p. 612.

Opinions of Attorney General, Book 17, p. 138, (office edition).

Opinions of Attorney General, Book 11, p. 56, (office edition).

In answer to your second question, it is my opinion that you are only required to make a record of the transfer as is required by Section 12 of the Act, *supra*.

Authorities *supra*.

The cited section simply requires the judge of probate to make a record of the transfer of the automobile license tag.

By way of dictum, it might be said that if the transferee of the license tag should require a certified copy of the transfer, of course, the judge of probate could make such certificate of transfer, certify to the same and charge a legal fee therefor. However, there are no provisions of law making it incumbent upon the judge of probate to furnish such a certificate.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Clerk of the Circuit Court,
Cullman, Cullman County, Alabama.

Fees—State Law Enforcement Officers—Arresting Fees.

Opinion by the Attorney General.

Dear Sir:

Please refer to your letter of December 12, 1929. In it you request my opinion:

Where an arrest is made by a State Law Enforcement Officer who is entitled to the arresting fee—the Sheriff of the County in which the arrest is made or the State Law Enforcement Officer.

In my opinion the State Law Enforcement Officer making the arrest is entitled to the fee, and not the sheriff, who did not make the arrest.

Opinion Attorney General, May 22, 1929 to Circuit Clerk, Marion County;

Section 926, Code of Alabama, 1923;

Section 3741, Code of Alabama, 1923;

In the opinion above cited we construed Section 4654, to entitle a State Law Enforcement Officer to fees earned thereunder.

The fee belongs to the State Law Enforcement Officer personally. It is immaterial that he may be paid a salary by the State.

The authority and power of a State Law enforcement officer is very broad.

Sections 926 and 927, Code of Alabama, 1923.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The State Tax Commission,
CAPITOL.

License Tax: Railroads liable for tax on gasoline and oil shipped from another State and withdrawn for own use; not in violation of Interstate Commerce Act.

Opinion by Assistant Attorney General Cobb.

Dear Sir:

I have your letter of December 11, 1929, in which you set out the following facts:

"Section 26 of the Revenue Act of 1927, being Acts of 1927, page 168, defines the terms 'retail dealer,' 'distributor,' 'storer,' etc. The term 'storer' is defined as follows:

"The term "storer" as herein used shall include any person who ships lubricating oils in this State in tank, barrel or drum quantities and stores the same and withdraws or uses the same for any purpose."

"Section 27 of the same Act fixes a tax of 2 cents per gallon upon the selling, distributing or withdrawing from storage for any use lubricating oils as herein defined in this State, but excepts therefrom the sale of lubricating oils in interstate commerce, and provides among other things, that the tax shall be paid but once. Section 28 provides that the excise tax imposed by this Act shall apply to persons, firms, corporations, dealers or distributors storing lubricating oils and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use. The definition of the word 'storer' apparently is the same as that used in the gasoline act of 1927, being Acts of 1927, page 17, and also the Act of the Legislature approved August 27, 1927, amending the 1923 gasoline act, being Acts of 1927, page 326.

"The question has been raised by certain railroads in Alabama as to their liability for the Alabama tax on gasoline and lubricating oils where the oils and gasoline are bought outside of the State and brought into the State for use on the railroad and for no other use. The railroads claim first, that they are not dealers or distributors within the definition of the statute, and they further claim that they are not within the terms of the word "storer" in that "storer" is defined as 'any person who ships lubricating oils in this State in tank, barrel or drum quantities and withdraws or uses the same for any purpose,' on the ground that the "shipper" is some dealer or distributor outside the State who sells to the railroad for transportation and use in Alabama.

"It seems to the Tax Commission that this is an attempt to give a very restricted meaning to the word "shipper" as used in conjunction with the word "storer" as defined in Sections 26 and 28 of the Act levying the tax on lubricating oils, being Acts of 1927, pages 168, 169, as referred to."

You request my opinion:

Are the railroads liable for the tax on such gasoline and oil when shipped to them in Alabama from outside of the State, and withdrawn for their sole use in their transportation services?

The answer to your question is in the affirmative.

Section 27 of an Act approved July 22, 1927, (Acts 1927, p. 169) reads as follows:

"Section 27. Every distributor, retail dealer or storer of lubricating oils as herein defined shall pay an excise tax of two cents (2c) per gallon upon the selling, distributing or withdrawing from storage for any use

lubricating oils as herein defined in this State, provided, however, that this excise tax shall not be levied upon the sale of lubricating oils in interstate commerce, and provide^d further that where the excise tax of Two cents (2c) per gallon upon the sale of such lubricating oils shall have been paid by a distributor or by a retail dealer or storer such payment shall be sufficient, the intention being that the tax shall not be paid but once."

The provisions of Section 26 of said Act, are as follows:

"Section 26. As used in this Act, the term 'lubricating oils' shall include any devices or substitutes therefor, commonly used in lubricating or oiling engines, bearings, journals, axles, hubs and other parts of machinery; provided, however, that nothing contained in this Act shall be held to apply to those products known commercially as "kerosene oil," "fuel oil" or "crude oil" used for lighting or heating purposes. The word "person" means and includes persons, corporations, co-partnerships, companies, agencies or associations, singular or plural. The term "distributor" shall include any person who engaged in the selling of lubricating oils in this State by wholesale domestic trade, but shall not apply to any transaction by such distributor in interstate commerce. The term "retail dealer" shall include any person herein defined as distributor who is also engaged in the selling of lubricating oils in this State at any place in this State in broken quantities. The term "storer" as herein used shall include any person who ships lubricating oils in this State in tank, barrel or drum quantities and stores the same and withdraws or uses the same for any purpose."

Section 28 of said Act reads as follows:

"Section 28. The excise tax imposed by this Act shall apply to persons, firms, corporations, dealers or distributors storing lubricating oils and distributing the same or allowing the same to be withdrawn from storage, whether such withdrawals be for sales or other use; provided, that "sellers" of lubricating oils and its substitutes paying the tax herein provided may pay the same computed and paid on the basis of their sales as hereinafter required and storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

Under the provisions of Section 27, *supra*, a tax of two cents per gallon is required of every storer in this State as defined in Section 26, *supra*, upon his withdrawing from storage for any use lubricating oils as defined in the Act.

It will be noted that Section 28, *supra*, among other things, provides that "storers and distributors shall compute and pay this tax on the basis of their withdrawals or distributions."

The above is in answer to your question as to the tax on lubricating oils.

Further answering your question with reference to tax on gasoline, Sections 2 and 3 of an Act approved Jan. 25, 1927, (Acts 1927, p. 17) are identical in language with Sections 27 and 28 of the Act approved July 22, 1927, *supra*,

with the exception that said Sections 2 and 3 relate to the tax on gasoline as defined in that Act, and said Sections 27 and 28, *supra*, relate to lubricating oils as defined in that Act. The term gasoline is defined in Section 1 of said Act approved January 25, 1927, (Acts 1927, pp. 16, 17).

Therefore, in so far as the two Acts above mentioned are concerned, the answer to your question relating to the tax on lubricating oil, answers that part of your question relating to the gasoline tax.

Referring to Act approved August 27, 1927, (Acts 1927, p. 326) which amends certain sections of an Act approved February 10, 1923, (Acts 1923, p. 36) Section 3 of said Act uses the identical language which is used in Sections 27 and 28 of the Act approved July 22, 1927, *supra*, with the exception that the former Act relates to tax on gasoline as defined therein, and the latter Act refers to the tax on lubricating oils as therein defined.

The provisions of the above mentioned Acts with reference to both the tax on gasoline and the tax on lubricating oils, are not in violation of the commerce clause of the Constitution, nor do they violate the terms of the Interstate Commerce Act, for the reason that when these oil tanks come to rest within the State, they lose their interstate character, and are subject to the tax.

"A state can tax oil brought into the State by an oil company for the company's own use within the State."

Union Oil Co., of California v. State et al., 216 Pac. 22.

"Gasoline imported by the distributor from another state but used in the conduct of its business, loses its interstate character and may be subject to the excise, consistently with the commerce clause."

Bowman, Attorney General, et al., v. Continental Oil Company, 256 U. S., 642.

The point directly involved in the instant case is expressly decided in the case of Foster and Creighton Co., v. Graham, State Compt., et al., reported in 47 A. L. R. 971. This is a Tennessee case in which it was held that "a statute placing a privilege tax upon one selling gasoline, and allowing the same to be withdrawn from storage, whether for sale or other use, reaches gasoline that is withdrawn and used without being sold."

See also Peterson Oil Co., v. Frary, State Inspector, 192 N. W. 366.

I am, therefore, of opinion that under the provisions of the above quoted Act, and in line with the above cited authorities, the railroads mentioned in your letter are liable for the tax on gasoline and oil shipped to them in Alabama from outside the State, and withdrawn for their sole use in their transportation service.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

State Auditor,
CAPITOL.

State Auditor authorized to pay feed bill where prisoner confined in jail condemned by State Prison Inspector.

Opinion by Special Assistant Attorney General Cobb.

Dear Sir:

I have your letter of March 3, 1929, enclosing a communication from the State Prison Inspector advising you that by order of his department the Butler County jail was closed and its further use for confining prisoners prohibited on July 13, 1927, and that this order went into effect on July 17, 1929.

You state in your letter among other things, that you have returned the feed bill of the sheriff of Butler County. You further state in your letter, that you are in receipt of a certificate from Circuit Judge A. H. Gamble saying that he ordered the sheriff of Butler County to confine prisoners in the condemned jail during the recent term of the Butler County Court. You request my opinion:

Under the existing circumstances am I authorized to pay this sheriff's feed bill?

In reply to your inquiry, it is my opinion that you are authorized to pay said feed bill, regardless of the fact that the jail has been condemned by the State Prison Inspector.

I do not concur in the opinion of the State Prison Inspector that you, as State Auditor, are authorized to refuse the payment of said feed bill under the Act approved Sept. 6, 1927 (Acts, 1927, p. 693). While under Section 4855, Code of Alabama, 1923, the State Prison Inspector is authorized to condemn jails, and has exercised said authority by closing the Butler County jail, this fact has nothing to do with the feeding of prisoners and the payment of feed bills provided by the statutes of Alabama.

I am therefore of the opinion that if the enclosed feed bill of the sheriff is correct, it becomes your duty to issue State warrant covering the same.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Superintendent of Education,
Wedowee, Randolph County, Ala.

County Boards of Education—District tax to transport children from district to school in another district.

Opinion by the Attorney General.

Dear Sir:

I have your letter of January 23, 1930. In it you state that in your County you have several districts (presumably school tax districts) where the schools have been discontinued; that the district lines have not been changed and that the children in these districts are being transported to other schools.

You request my opinion:

1. May I pay the special three mill district tax towards transportation of these children to other schools?
2. May I use such district tax in paying the salaries of the teachers in such other schools where the children attend?

In answer to your first question will state that you cannot do so.

In answer to your second question will state that you cannot do so.

The special three mill district tax which the Constitution authorizes to be levied and collected, when voted in the manner provided by law, must be used for the exclusive benefit of the public schools of the district in which levied and collected, and when an attempt is made to use such district tax in transporting the children from the tax district into another territory to a school adjoining such district, under the facts as stated by you, or when any attempt is made to use such district tax to pay salaries of teachers teaching school in another district, then such act is in violation of the laws of Alabama.

Opinion of Attorney General 1926-1928, p. 173.

Under separate cover, I am sending you a copy of the Biennial Report of 1926-1928 above referred to and invite your attention to the opinion above cited.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The State Superintendent of Education,
Montgomery, Alabama.

Schools—Method followed by municipalities in assuming charge of educational affairs therein. How re-transfer effected.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 6, 1930, in which you state that the Federal Census which is now being completed indicates that several towns in Alabama, the schools of which have been under the jurisdiction of the county board of education, will have attained a population of 2,500 inhabitants, which automatically changes the classification of such towns to cities within the meaning of the Alabama School Code, 1927, entitling such municipalities to control their schools through duly elected city boards of education.

You request my opinion:

What steps are necessary to legally effect the transfer of authority in the government and control of the schools from the county board of education to the city board of education?

In answer to your question will state that you, of course, are aware that cities within the meaning of the Alabama School Code, 1927, does not include cities of less than six thousand population according to the last or any succeeding Federal Census, which are located in counties having a population of 300,000 or more inhabitants according to the last or any succeeding Federal Census, and having this in view, it is my opinion, that, in all other municipalities defined as cities in Section 188, Alabama School Code, 1927, the city council or city commission thereof should, at its next regular meeting, appoint a city board of education, as required by Section 191 of said Code, which members of said city board of education must possess the qualifications therein prescribed. The county board of education should, at its next regular meeting show upon its minutes the fact that the control of the schools of such municipality or municipalities has been transferred to the city board of education by reason of the fact that the municipality has attained the population prescribed by law.

Whenever a municipality, as herein above defined, attains the population prescribed by law, it is mandatory that the city council or city commission thereof appoint a city board of education. If, **after having complied with the provisions of law** as above outlined, the city board of education and the county board of education desire to consolidate, this matter must be submitted to a vote of the people of the whole county, as provided by Sections 108, 109 and 110, Alabama School Code, 1927.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Deputy Tax Assessor,
Bessemer, Jefferson County, Alabama.

Taxation—Masonic Temple Association, not being a subordinate Masonic Lodge; as defined in the Act approved Dec. 9, 1859, (Acts 1858-59, p. 458), not exempt from taxation thereunder.

Opinion by the Attorney General.

Dear Sir:

This acknowledges receipt of your letters of January 12th and January 14th, 1928, addressed to this office and also acknowledges receipt of your letter of January 28, 1928, together with enclosure addressed to the State Tax Commission.

If I understand the facts as stated by you, then the facts are as follows:

The Masonic Temple Association of Bessemer, Jefferson County, Alabama, is a domestic corporation which was organized and incorporated for the purpose of building, equipping and maintaining a Masonic Temple at Bessemer. In pursuance of such object, it has purchased several vacant lots located in the City of Bessemer upon which it proposes to erect a Masonic Temple. I understand that the Masonic Temple Association is not a subordinate Masonic Lodge as created and defined under and by virtue of the Act approved December 9, 1859, (Acts 1858-1859, p. 458), which Act incorporated the "Most Worshipful Grand Lodge of Free and Accepted Masons of the State of Alabama," and, upon granting of a charter to a subordinate lodge thereof by the Grand Lodge, made each subordinate lodge a body corporate, and granted certain exemptions from taxation both to the Grand Lodge and each respective subordinate lodge thereof. My understanding is that the Masonic Temple Association is simply a private corporation, organized under the provisions of Article 1 of Chapter 274, Code of Alabama, 1923.

The foregoing being assumed to be the facts, you request my opinion:

Should the Tax Assessor of Jefferson County assess the above mentioned lots for State and County taxes?

In answer will state that if the facts, as stated above, are correct, then the Masonic Temple Association does not enjoy any exemptions granted by the Act approved Dec. 9, 1859, supra, and I know of no statute exempting said lots from taxation. If the lots have been purchased by said corporation since October 1, 1927, then they should be assessed to the owner as of October 1, 1927, and not to this corporation for the assessment year of 1928.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The State Tax Commission,
CAPITOL.

Peddlers—Person who carries with him merchandise from place to place, house to house, person to person, and makes his sales in this manner is not only liable for a peddler's license, but is also liable for a license as a dealer in such articles or commodities pays.

Opinion by the Attorney General.

Gentlemen:

I have your letter of June 10, 1929. You state that a person is selling automobile accessories to consumers under such circumstances as subject him to a peddler's license. You inquire whether or not this person must also procure the license imposed on dealers in such commodities.

I am of the opinion that such person is not only liable for peddler's license but liable for the dealer's license.

Biennial Report of Attorney General, 1926-1928, p. 626.

The fact that one pays a peddler's license does not relieve him of the duty of procuring a dealer's license for the specific article which he peddles wherever a dealer's license for the particular commodity is mentioned in the tax schedules. The licenses required are separate and distinct. It was the intention of the Legislature to impose a separate and distinct license upon persons selling merchandise as peddlers.

Schedule 80 of Section 361 of the Acts of 1919, p. 425.

It was clearly the intention of the Legislature to impose a license upon dealers in automobile accessories.

Schedule 13, Section 361 of the Act of 1919, p. 402.

The fact that one has procured a dealer's license would not authorize one to peddle the commodities he was authorized to deal in. Conversely, one having authority to peddle merchandise is not relieved of the duty of obtaining a license to deal in the particular class of merchandise which he peddles wherever the commodity is subjected to a dealer's license.

Opinions Attorney General, Book 11, p. 266, (office edition).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The State Superintendent of Education,
Montgomery, Alabama.

Schools—When an incorporated municipality attains a population of 2,500 or more inhabitants, according to the last or any succeeding Federal census, except where such municipality is located in a county having a population of 300,000 or more inhabitants according to the last or any succeeding Federal census, which latter municipality has less than 6,000 population according to the last or any succeeding Federal census, the government and control of the schools in such municipalities not excepted automatically comes under a city board of education as provided in Article IX and Section 290, Alabama School Code, 1927.

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 26, 1930, in which you request my opinion:

1. Can a city, as defined in Section 189, Alabama School Code, 1927, elect to remain under the authority of the county board of education or must it automatically become an independent district as provided in Section 290 of said Code?

2. In the event a city, as defined in Section 189, Alabama School Code, 1927, must automatically become an independent district as set forth in Section 290, must the transfer be taken on any other than the official report of the Federal census?

In answer to your first question will state that Section 189, Alabama School Code, 1927, does not define a "city." Section 188, Alabama School Code, 1927, defines a city and Section 189 of said Code simply tells you **what are not** cities within the meaning of the Alabama School Code. You will observe by careful reading of Section 189, *supra*, that cities of less than six thousand population in counties of 300,000 or more inhabitants, are not cities within the meaning of the School Code.

Section 290, Alabama School Code, 1927, therefore has no reference to cities of less than six thousand population, according to the last or any succeeding Federal census, which are located in counties having a population of as much as 300,000 or more inhabitants, according to the last or any succeeding Federal census, but said Section 290 of said Code does have reference to all other cities as defined in Section 188 of said Code.

In view of my answer to your first question, an answer to your second question is not necessary.

The opinion of Assistant Attorney General Koonce addressed to you under date of May 12, 1930, is therefore withdrawn and should not be followed.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Wetumpka, Elmore County, Alabama.

Elections—precincts and districts—only one voting place in each election district.

—division of precincts into districts, when and how made.

—number of voters to precinct.

—number of voters to district.

—meaning of Section 436 as to allowing not more than three boxes to voting place.

—reconciliation of Sections 425 and 427, Code of Alabama, 1923, as to number of voters in a precinct.

Opinion by the Attorney General.

Dear Sir:

I have your letter of Sept. 19, 1930, in which you request my opinion:

First: Can we make two polling places out of one where there are more voters than allowed by law?

Second: Can we divide the voters whose names begin with the letters A through M, voting in one place, and all those whose names begin with the letters N through Z voting in another place?

In answer to your first question will say that there may be more than one voting place in a **precinct**, but not more than one voting place in a **district**. Section 425, Code of Alabama, 1923, provides that the counties in this state as now divided into election **precincts**, and the boundaries of such **precincts** as now defined, shall remain the same until changed by order of the court of county commissioners, or other like governing body. This section of the Code makes it mandatory, however, that if any of the election **precincts**, as now existing in any of the counties of the State, contain **more than five hundred legal voters**, such election **precincts** shall be divided or subdivided into election **districts**. Notice the distinction between **precincts** and **districts** here. The next section (Section 426) provides that no election **district** shall contain **more than three hundred legal voters**. The next section (Section 427) places the duty of **subdividing precincts into districts** upon the court of county commissioners, or other like governing body, which duty is to be performed at a **regular meeting** of such court. There is an apparent error in this section in requiring the duty to be performed by said court when an election **precinct** contains more than **three hundred legal voters**. Apparently there is a conflict between Section 425 and Section 427 in this regard. This apparent error also appears in the Act of 1915 from which the Code sections were taken. Upon a reading of the entire law on the subject, and an examination of prior Acts pertaining thereto, I am of the opinion that the intention was that no election **precinct** should contain more than **five hundred legal voters**, and that no election **district** therein should contain more than **three hundred legal voters**, and that it is the duty of the court of county commissioners or other like governing body to subdivide **precincts** and the **districts** in such **precincts** so as to accomplish

this. It seems that the legislature erroneously used the words "precinct" and "district" interchangeably in Section 428, but I think that what it had in mind particularly there was an election **district**, when speaking of "three hundred," while of course the duty to rearrange and subdivide as a result of the number of votes cast at a **general or primary election** as there mentioned, applies to rearrangement of precincts and districts, to this end, viz, that there shall at no time be more than **five** hundred legal voters in a **precinct** and not more than **three** hundred legal voters in any **district** thereof.

After the rearrangement or division and subdivision of precincts and districts in accord with the above, the Court of County Commissioners should comply strictly with Sections 429, 430, 431 and the Probate Judge should comply with Section 432. These sections relate to description of boundaries, filing and posting same, numbering of **districts in precincts**, designating places of holding of elections in **districts**, newspaper notices, etc. Electors are required to comply strictly with Section 433, as to the **district** in which they should vote.

You will observe that Section 431, Code of Alabama, 1923, specifically provides that the court of county commissioners shall designate the place of holding elections in each election district, and that—

"there shall be in no election **district** more than one voting place."

It is true that Section 436, Code of Alabama, 1923, requires the Probate Judge, sheriff and circuit clerk to provide one, and not more than **three** ballot boxes for each voting place, but this does not mean that all **three boxes, if furnished, shall be open for the deposit of ballots therein at the same time**. This was so fixed so that if one box became filled, then resort might be had to the second, then to the third, but not that at a voting place there could be in reality three voting places. I am aware of a custom grown up in some counties to the contrary, but I am not construing custom. I am construing the law, and the law very plainly states that there shall be **only one voting place** in an election district. There may be any reasonable number of election **districts** in an election **precinct**, of course, and hence, as many voting places in the **precinct** as there are election **districts**.

There is only one set of election offices for each election district. The idea that in an election **district** there can be three balloting or voting places, even though in the same room or building, and a separate set of election officers for each, is contrary to the law.

Election districts are determined by fixed **boundary lines** and not by **names of voters therein**.

I believe that the above answers both of your questions.

Yours truly,

CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The County Superintendent of Education,
Clayton, Barbour County, Alabama.

Schools—District tax of one district not transferred to or expended in another district.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 6, 1930, referring to an opinion rendered Feb. 13, 1930, to the County Superintendent of Education of Coffee County, Alabama, concerning the use of the special three mill district tax.

You request my opinion:

If a school in one district is consolidated with a school in another district and the children transported to said consolidated school, may the district tax of the first district be expended in the district in which the consolidated school is located?

In answer to your question will state that such special school district tax cannot be expended either for transportation to the school or for the payment of the salaries of teachers therein. The special three mill district tax must be used for the exclusive benefit of the public schools of the district in which levied and collected.

Section 289, Alabama School Code, 1927,
Opinions of Attorney General, 1926-1928, p. 173, 652.

The opinion of Feb. 13, 1930, by Assistant Attorney General Koonce, has been withdrawn, after having been sent out of the office in error.

I am sending you under separate cover copy of the Biennial Report referred to above.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Schools—Increase of expense allowance of county superintendent of education.

Opinion by Assistant Attorney General Koonce.

Dear Sir:

On May 22, 1930, you wrote me and referred to an opinion rendered by me to you on December 17, 1929, wherein I held that the County Board of Education of Clarke County could not legally allow the Superintendent of Education a specified sum each month for expenses with the understanding that the County Board of Education reserve the right to increase such expense allowance.

You request my opinion:

Can the County Board of Education of Clarke County allow the County Superintendent of Education a definite sum each month as expenses with the understanding that the Board of Education may increase such expense allowance?

In my opinion if the County Superintendent of Education is elected under the provisions of the Local Act which provides for a definite term his expense allowance cannot be increased during his term of office, but if he is appointed by the County Board of Education under the provisions of Section 138 of the School Code of 1927, his expense allowance can be increased during his term of office.

Section 281 of the Constitution of Alabama of 1901, provides that the salary, fees or compensation of any official holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or decreased during the term for which he shall have been elected or appointed.

If a county superintendent of education has a term of office within the contemplation of the above Section 281 of the Constitution of 1901, his salary or compensation cannot be increased during such term. In my opinion all county superintendents of education who are elected to office under the provisions of a Local Act which provides a definite term of office, have a "term" of office within the contemplation of the above Section 281, but, county superintendents of education who are appointed by the county board of education under the provisions of Section 138 of the School Code of 1927, do not have a "term" of office within the contemplation of the above Section 281.

The opinion of the Supreme Court of Alabama in the case of *McMurray v. County Board of Education of Franklin County*, 112 So. 644, contains the following:

"* * * A county superintendent has a 'term' protected by Section 175 of the Constitution, yet not a 'term' within the provisions of Section 281 of the Constitution."

The Supreme Court had under consideration, when it rendered the above opinion a case in which the county superintendent of education was not elected by the people under a Local Act providing for a definite term of office.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

The Circuit Solicitor,
5th Judicial Circuit,
Roanoke, Randolph County, Ala.

Prisoners—Medical attention—payment therefor.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of August 12, 1930, in which you state that your county has a quarantine officer who is also jail physician for Randolph County. He had recently under his treatment a negro girl who was affected with tetanus, which is a contagious disease, but in the treatment of the girl he spent the sum of \$200 for antitoxin and other drugs. He now presents this bill to the Court of County Commissioners and requests that it be paid. You state that the negro girl nor any of her people have any funds or property to pay for the treatment.

You request my opinion:

Can the Commissioners Court pay this bill under Section 1201, Code of Alabama, 1923?

I assume from your letter that the negro girl was a prisoner in the jail, and upon that assumption this opinion is based.

I am of the opinion that the Court of County Commissioners should pay for the antitoxin and other drugs used in the treatment of the negro girl.

Section 4808, Code of Alabama, 1923;
Malone v. Escambia County, 116 Ala. 214.

It was the duty of the sheriff or jailer under the Section of the Code, supra, at the expense of the county to provide necessary medicine and medical attention to those (prisoners) who are sick, when they are unable to provide for themselves. This statute has been codified and appears in all Codes since 1886. The plain intent of the legislature was to require the sheriff to provide medicine and medical attention to persons confined in jail.

Justice Harrison in the case of *Malone v. Escambia County*, supra, had this to say:

" * * * When a suit is brought under said section the complaint should show that the services were rendered or medicine furnished to person in jail and that such person was unable to provide such services and medicines for himself or was in destitute condition."

The Commissioners Court under your statement of facts, could not pay for this treatment under Section 1201 of the Code of Alabama, 1923, but the same is to be paid under Section 4808, supra.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Troy, Pike County, Alabama.

General Elections—Candidates—Time in which to qualify.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of September 27, 1928, in which you state that you are likely to have an independent candidate in your county for Judge of Probate, and you desire to know the latest time at which such an independent candidate can qualify and be placed on the ticket for the general election to be held in November.

In answer to your question I am of the opinion that a person has a right to qualify as a candidate in the coming general election within not less than twenty nor more than sixty days before said election is to be held.

Section 648, Code of Alabama, 1923;

Section 462, Code of Alabama, 1923.

Section 462 of the Code, supra, provides that the probate judge of each county shall cause to be printed on the ballot to be used in their respective counties, the names of all the candidates who have been put in nomination and certified in writing and filed with him not more than sixty days nor less than twenty days previous to the election.

Section 407 on the one hand and Sections 462 and 648, supra, on the other hand, appear to be in conflict and insofar as said Section 407 is in conflict with Sections 462 and 648, the latter Sections should prevail for the reason that, as to the Secretary of State his duties are defined only in said Sections 462 and 648. This is also the construction of the Secretary of State through a period of years and such a departmental construction should not be overturned without a clear legislative mandate to the contrary.

The opinion of October 8, 1928, addressed to the Judge of Probate of Pike County, is hereby withdrawn and the same is overruled to this extent.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Clerk of the Circuit Court,
Athens, Limestone County, Ala.

Trial tax and solicitor's fee—how taxed.
How same is paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 26, 1930, in which you request my opinion as follows:

1. Where a defendant is sentenced for fine and cost to hard labor for the county should trial tax and solicitors fees be taxed against him?
2. Should the State Department send these items of cost back to the clerk or hold same and turn over to the proper department?

Answering your first inquiry will say that the trial tax and solicitor's fee should be taxed, as in all other cases where the conviction is had. This is provided for by Section 4½ of an Act approved Sept. 15, 1919 (General Acts, 1919, p. 284). See also:

Biennial Report of Attorney General, 1926-28, p. 213;

Biennial Report of Attorney General, 1926-28, p. 216.

Opinions of the Attorney General, to the Clerk of the Circuit Court of Houston County, Book 19, (Office edition, 1930).

Answering your second inquiry will say that the trial tax in criminal cases when the defendant is convicted and thereby taxed with the cost and is sentenced to hard labor for the county is not included in the cost bill paid by the State but where the conviction is had by a solicitor not paid a salary by the State or County, then this item of solicitors fee is payable as other costs.

Opinion Attorney General, Vol. 4, p. 30, (Office edition).

Now, as to payment of fees of Circuit Solicitor or trial tax, though this question was not asked, your attention is invited to Section 3, of an Act approved Feb. 18, 1927, (General Acts, 1927, p. 45).

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

President, Board of Revenue,
Seale, Russell County, Ala.

Act approved August 30, 1927 (Local Acts, 1927, p. 339).

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of September 24, 1930. You request my opinion:

Does the president of the board of revenue when elected as such president, hold the office of president for the entire term of his office, or is he selected for a year at a time?

In answer to your question, I am of the opinion that at the first meeting of said board of revenue after the approval of the Act, the members thereof shall choose a president of said board of revenue, who shall hold office until his term as such member of said board expires.

Local Acts, Alabama, 1927, p. 339;

Local Acts, Alabama, 1919, Section 4, p. 103.

It is to be observed that the Local Act of 1927, supra, amending Section 3 of the Act approved Sept. 3, 1919, entitled an Act "to establish a board of revenue for Russell County and provide for the appointment or election of the members thereof * * ." The Act of 1927, supra, does not have any reference to Section 4 of the Act of 1923. Therefore, the president of the board is chosen by the members at its first meeting after the election, and the one chosen acts as president for the entire term of his election.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

October 10, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Board of Revenue of Tuscaloosa County had no authority, in January, 1928, to make order for payment out of County Treasury to void assessment made by City of Tuscaloosa for paving streets adjoining county property, owned and used by the county for governmental purposes, during the years 1914, 1923, 1924, 1925 and 1927, in regard to which paving the Board of Revenue has made no agreement with the city to pay any part of such paving prior to such paving.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Your letter of Sept. 18, 1930, is acknowledged. You make the following statement of facts: In the year 1914, 1923, 1924, 1925 and 1927, the City of

Tuscaloosa paved certain of its streets adjoining which was property belonging to Tuscaloosa County owned and used by it for county governmental purposes. There was no agreement with the Board of Revenue of Tuscaloosa County for the payment of any part of the cost of this paving. The City of Tuscaloosa made what purported to be an assessment against the county for part of the cost of each of such pavings. In January, 1928, the Board of Revenue made an order providing payment out of the county funds of such assessments.

You wish my opinion as to whether the Board of Revenue of Tuscaloosa County acted within its authority under the law to make such order, and did the county depository legally pay over such money to the City of Tuscaloosa.

In reply will say that, in my opinion, the assessment in question was entirely void and created no liability on the part of the County for its payment.—City of Huntsville v. Madison County, 166 Ala. 389. This certainly was no debt due by the County. It was no legal claim of the City against the County. Did then the Board of Revenue have the legal authority to make such a donation to the City? No such authority has been called to my attention and I have been unable to find any. The case of the Town of Eutaw v. Coleman, must, in my opinion, be confined to the facts of that particular case and even as to those facts to the period of time prior to adoption of the Highway Code of Alabama. There was no agreement by a majority of the Supreme Court in that case to anything except that under the undisputed facts in that case payment by the County of the part of the cost, agreed upon prior to the commencement of the work, was permissible. In that case the Court of County Commissioners agreed to pay part of the cost of paving of the street adjoining the County Courthouse in order to have the improvement made. In the case under consideration, the payment was of a void assessment against the County.

The City had a perfect right to pave the street in question at its own cost and did so. All debts incurred were debts against the City. Did the Board of Revenue have legal authority to pay the debts of the city which it took no part in making and for which it incurred no liability? **Clearly not.** If Section 2252 of the Code of Alabama, 1923, may be construed as authority for such payment under the facts of the Town of Eutaw case, it clearly cannot be stretched to cover the facts of the case under consideration.

The payment in question was, in my opinion, clearly illegal.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Judge of the Inferior Court,
Prattville, Autauga County, Ala.

Inferior Court of Autauga County. Whether county to pay for its office supplies.

Opinion by Attorney General.

Dear Sir:

I have your letter of July 14, 1930.

You state that the Inferior Court of Autauga County was created by an Act of the Legislature of 1923 giving it jurisdiction over the entire county. The Act was amended in 1927.

You request my opinion:

Whether the stationery such as subpoena blanks, dockets, etc., necessary to the court should be paid out of the general funds of the county.

Upon examination of the Local Act establishing said court, as amended by Acts of 1927, I find no provision of law requiring the County to furnish such supplies.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

The County Superintendent of Education,
Ashville, St. Clair County, Ala.

Schools—Matriculation, special and incidental fees.

County Superintendent of Education—Premium on bond of.

Opinion by the Attorney General.

Dear Sir:

I have your letters of March 22, 1930, (Request No. 2089-240), and Sept. 29, 1930, (Request No. 2446-240), and a letter from Mr. John W. Inzer, Attorney at law, Ashville, Alabama, dated May 5, 1930, (Request No. 2178-240.) You state that in accordance with Section 467, School Code, your County Board of Education has assessed each enrolled high school pupil a matriculation fee of \$5.00 for each semester. These letters request that I render you an opinion on the following questions:

1st. Has a County Board of Education authority to collect a matriculation fee?

2nd. Has a County Board of Education any legal right to employ and pay an attorney to force the collection of matriculation fees in accredited high schools?

3rd. If a County Board of Education has no authority to employ and pay an attorney to force the collection of matriculation fees in accredited high schools, to whom shall the County Board of Education look for legal counsel?

4th. Is it legal to pay the premium on the bond of the County Superintendent of Education out of County School funds?

In answer to your first question will state that the Legislature, by Section 467, Alabama School Code, 1927, attempted to permit County Boards of Education and City Boards of Education to collect a matriculation fee for each semester from all pupils in accredited high schools, including county high schools, and attempted to give to the respective Boards of Education authority to determine the amount of such fee. This Section of the School Code, *supra*, also stated that the proceeds of such fee should be expended under the direction of the County Board of Education or the City Board of Education as the case might be. In this same Section of the School Code, *supra*, the Legislature attempted to give County Boards of Education and City Boards of Education the power to **require** a reasonable fee for library, laboratory and shop work in addition to the matriculation fee, the amount of such fee to be determined by the proper Board of Education. No attempt was made on the part of the Legislature to clothe Boards of Education with power to collect matriculation fees in public schools other than accredited high schools including County High Schools. No attempt was made on the part of the Legislature to clothe Boards of Education with power to require an additional fee for library, laboratory and shop work in other than accredited high schools including County high schools.

Accredited high schools as used in Section 467, *supra*, relate to high schools as defined in Section 126, Alabama School Code, 1927.

County high schools as the expression is used in Section 467, *supra*, refer to those high schools for which definite appropriations are made by the Legislature and for the establishment of which, provision was made before the adoption of the Alabama School Code of 1927.

Section 126, *supra*, stated the following:

"The public schools of the county shall include elementary schools, that is, grades one to six inclusive; Junior high schools, that is, grades seven to nine, inclusive; and Senior high schools, that is, grades ten to twelve, inclusive."

Thus it will be seen that the attempt on the part of the Legislature to permit the collection of a matriculation fee and also a reasonable fee for library, laboratory and shop work was intended to apply only to (1) grades seven to nine inclusive, denoted Junior high schools; (2) grades ten to twelve inclusive, denoted Senior high schools, and (3) County high schools, which may contain grades seven to twelve inclusive.

Assuming to be legal, therefore, the attempt on the part of the Legislature in Section 467, *supra*, to give Boards of Education authority to collect a matriculation fee, such could not extend to other than Junior high schools,

Senior high schools, and County high schools, as herein defined. However, high schools are a part of the general public school system which it is the duty of the Legislature to establish, organize and maintain under Section 256, Constitution of Alabama, 1901. Section 256, Constitution, *supra*, reads in part as follows:

"The Legislature shall establish, organize and maintain a liberal system of public schools throughout the State for the benefit of the children thereof between the ages of seven and twenty-one years."

The word "liberal" as used in the above quoted section of the Constitution, in my opinion, means "free."

Webster's International Dictionary.

The word "public" as used in the above section of the Constitution, in my opinion, means "open to common or general use."

Webster's International Dictionary.

As said by the Supreme Court of Alabama:

"The public school system, which the Constitution enjoins shall be established, organized and maintained, extends throughout the State, and is for the equal benefit of the children thereof, operating upon and in favor of all alike, **without special local rights, privileges or burdens.** In addition to the special funds enumerated, and a poll tax, the power of taxation, as conferred on the General Assembly, and limited by the Constitution, was deemed a proper and sufficient mode of discharging this legislative duty."

Schultes v. Eberly, 82 Ala. 242.

The public school system of the State is to be **maintained** through (1) the funds provided by the Constitution, (2) county and district taxes authorized to be levied, and (3) such appropriations as it is the "duty" of the Legislature to make under Section 260, Constitution of Alabama, 1901, and, when it is said that the Legislature shall establish, organize and maintain the system, in my opinion, it was intended that the Legislature **shall** do so to the extent that the system shall be liberal, that is, **free**, and that the public schools shall be public, that is, **open to common or general use**, and such system must be of such a nature that it will be **adequately maintained to the extent** that it will extend throughout the State **operating upon and in favor of all alike, without any special privileges or burdens.** It was not intended by the framers of the Constitution that the Legislature should avoid its responsibility to make additional appropriations sufficient to maintain the system by attempting to confer upon Board of Education the power to require special fees as a condition precedent to the system being open to every boy and girl.

A matriculation fee is a fee charged a child to **enroll it or to enter it in school.** It is a fee charged as a **condition precedent to permit such child to enroll or enter.** The requirement of a child, as a condition precedent

to its enrolling or entering a public school of this State as defined in Section 256 of the Constitution, that it, the child pay a matriculation fee, is violative of Article XIV, Constitution of Alabama, 1901. The attempt on the part of the Legislature to give a Board of Education power to levy a fee, is in effect an attempt to give it the power to tax. It is an attempt to give it the power to tax **without reference to the wishes of the people, either parents or children.** In my opinion, it can no more grant to a County Board of Education the right to tax **by way of a fee** than it could have given district trustees the power to levy a tax, as the matter is discussed in *Schultes v. Eberly*, *supra*.

Therefore, it is my opinion that Section 467, Alabama School Code is ineffective insofar as it attempts to make the payment of matriculation and special fees compulsory. It will be noted that the new Code unlike the School Laws prior to its adoption, makes absolutely no mention as to persons within the compulsory attendance ages, even as to incidental fees.

In answer to your second question will state that I find no authority for the County Board of Education to employ an attorney for such a purpose.

An answer to your third question is unnecessary inasmuch as the payment of such fees is not compulsory.

In answer to your fourth question will state that the premium on the bond of the County Superintendent of Education should be paid by the County out of County funds and not out of school funds.

Section 2658, Code of Alabama, 1923.

Opinions of Attorney General, 1926-1928, p. 258.

Your request did not deal with **incidental** fees as mentioned in Section 182, Alabama School Code, 1927, but my ruling with regard to such fees would be the same. **Such decisions as have been rendered by our Courts with regard to collection of incidental fees have never turned upon nor considered the constitutional question here mentioned.**

It is, indeed, an anomaly that the framers of the Constitution should have made it mandatory that the Legislature establish, organize and maintain a liberal system of public schools throughout the State for the benefit of the children between the ages of seven and twenty-one; and that the framers of the Constitution should also have provided part of the funds for the accomplishment of this and given the Legislature ample authority for raising additional funds; and that the Legislature should then attempt to say that a parent, however poor, is compelled to send his child to school under penalty of fine and imprisonment; and that the Legislature, in the same breath, should have attempted to have fixed it so that when the applicant privileged by the Constitution presented himself at the school-house door, he should be met with (1) a tax upon his entrance, (2) an additional tax upon **his use of property purchased with public funds**, and (3) an additional tax in the way of an incidental fee, for things, for the procurement of which, the Legislature had ample authority, **and the duty** under Section 260, Constitution of Alabama, to make **sufficient appropriations** out of the general treasury of the

State. Such a system is not liberal, but is its direct opposite. Such a system is not public, but operates to exclude the minor child of a parent of humble means from a free education to be given at the expense of the tax payers of the State in public schools supposed to be supported with funds raised through the legitimate methods of raising revenue. And none other. Such a system is not a system without special burdens but is a system with special burdens. **All of the incidental** expenses which it is necessary to incur in **maintaining** the **public** schools of the State, can and must be provided under the Constitution by sufficient appropriations by the Legislature and through local taxes levied in accordance therewith. If the Legislature failed to do its duty, then it cannot clothe a Board of Education with power to tax by in-direction to make up for its failure, by the imposition of a tax in the way of a fee, in the assessment of which the people have no voice.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Judge of Probate,

Tuscaloosa, Tuscaloosa County, Alabama.

New York Stock Exchange—State license it should pay when opening a branch office in Alabama.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 4, 1930, in which you state that a branch of the New York Stock Exchange wishes to open a place of business in the City of Tuscaloosa, Alabama, known as "Stock and Bond Broker."

You request my opinion:

Does Schedule 102, Revenue Law of Alabama, apply?

Schedule 164, p. 305, of the Revenue Laws of Alabama, 1929, (Compilation), is as follows:

"Stocks and Bonds.—For each person dealing in stocks and bonds, fifty dollars. The payment of the license required by this schedule shall authorize the doing of business only in the town, city or county where paid."

You will note that this Schedule says among other things "each person dealing in stocks and bonds." The question arises who are dealers in stocks and bonds. There is but one answer, those who buy and sell. Certainly this is the business of the New York Stock Exchange. Then it comes under

the Schedule above quoted and is due to take out a license, the cost of which is \$50.00. See definition "Broker," Websters International Dictionary.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Judge Municipal Court of Birmingham,
Third Division,
Birmingham, Jefferson County, Alabama.

The premium on the Clerk's bond required by Section 4 of Local Act 601 (Local Acts 1927, p. 389) not payable by the county.

Opinion by Assistant Attorney General Evans.

Dear Sir:

Receipt of your letter of May 21st is acknowledged. You ask my opinion as to whether or not the words: "and for any other incidental expenses," used in the concluding paragraph of Section 19 of Local Act No. 601, approved September 7, 1927 (Local Acts, 1927, p. 389) includes the expense of paying the premium of the bond required of the Assistant Clerk of the Inferior Court of North Birmingham, by Section 4 of said Act.

In reply will say that it is my opinion that it does not. Said Section 19 reads as follows:

"The Board of Revenue of Jefferson County, Alabama, at the expense of Jefferson County, shall provide suitable court rooms to hold said court and shall also provide all necessary dockets, books and other supplies for the use of said court, and shall provide for the payment of rent for court rooms, in case court rooms are rented, and for any other incidental expenses."

It is my opinion that the incidental expenses intended by said words are expenses of like kind to those enumerated—such as are incident to the holding of the court. In my opinion the premium on the clerk's bond does not fall in that class.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Judge of Probate,
Abbeville, Henry County, Ala.

County Court of Commissioners.—Section 5076 Code of 1923. Employment of relatives by Commissioner's Court prohibited.

Opinion by Assistant Attorney General Patrick.

Dear Sir:

I have your letter of July 28, 1930.

You state that you are the Probate Judge of Henry County and, as such, the chairman and a member of the County Commissioners Court. Your son is your chief clerk as probate judge and is familiar with the functions of the county commissioners court.

You wish my opinion:

Whether it is legal for your son to be employed to perform the clerical duties of the County Commissioners Court,

In reply will say no.

Opinion Attorney General, Book 17, p. 45;
Opinion Attorney General, Book 15, p. 119.

This has been the uniform holding of the office over a period of two years.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Judge of Probate,
Cullman, Cullman County, Alabama.

Road Duty—National Guardsmen exempt from.
Poll Tax—National Guardsmen exempt from.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 27, 1930. In it you state that a number of men in Cullman County go off each year and take training at Anniston as National Guardsmen for fifteen days and that these men demand exemption from road duty, jury duty, etc., under Section 45 of an Act approved September 9, 1927 (General Acts, 1927, p. 581).

You request my opinion:

1. Are members of the National Guard of Alabama exempt from road duty for the full year when they serve only fifteen days?
2. Are such persons exempt from being called for road duty only during actual service?
3. Are they really in service the full year?
4. Can such persons show their official service record to the Judge of Probate in the County in which they live and be placed on the poll list without paying poll tax?

In answer to your first question will state that every officer and enlisted man of the National Guard of Alabama is exempt from poll tax, road duty, street tax and jury duty, during his active membership, any local or special law to the contrary notwithstanding.

In answer to your second question will state that such persons are exempt from the matters mentioned above not only during the time that they are in camp but during their entire membership in the National Guard.

In answer to your third question will state that National Guardsmen are really in service the full year.

In answer to your fourth question will state that it is necessary, in order for an officer or enlisted man of the National Guard of Alabama to prove his exemption from poll tax, road duty, street tax, or jury duty, to present to the proper authority whose duty it is to collect the tax or see that the duty is performed, a certificate from the commanding officer of his company, troop, battery, or other similar organization, of his membership therein. It is the duty of the military officer in charge of the unit to revoke the certificate of the holder of it whenever such person is absent from four consecutive formations without satisfactory excuse to the military officer in charge. The certificate, which is proof of exemption, is good only for the calendar month in which it bears date, but may be renewed from month to month by the officer whose duty it is to furnish it. If the person claiming exemption under this law presents to you a certificate not of the calendar month at which time the exemption is claimed, he should be informed by you that the certificate is of no value and that he should obtain a certificate dated in the calendar month at which he claims exemption. There is no provision for members of the National Guard of Alabama, as such, receiving exemption from poll tax by presentation of the official service record. The exemption from poll tax is granted on presentation of the type of certificate of membership in the National Guard prescribed by the Adjutant General.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

The County Superintendent of Education,
Fayette, Fayette County, Alabama.

Schools—Use of district tax and county tax to install tiling in well on property not owned by county board of education.

Opinion by the Attorney General.

Dear Sir:

Please refer to your letter of Feb. 17, 1930 concerning which you were rendered an opinion on March 10, 1930 by Assistant Attorney General Koonce. In your letter you stated that there is a well located on property which is used for school purposes, but it is not deeded to the County Board of Education nor to the State.

You requested my opinion:

Can district tax proceeds or county tax proceeds be used to pay for tiling and the installation of same in the well which is referred to above?

In my opinion you cannot use district tax proceeds or county proceeds for such purpose. The opinion of March 10, 1930 by Assistance Attorney General Koonce is hereby withdrawn and declared to be null and void.

Please acknowledge receipt of this substituted opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Chief Examiner,
Department of Examiners of Accounts,
CAPITOL.

Act approved Sept. 25, 1915, (Local Acts 1915, p. 470) constitutionality of.

Act approved Aug. 2, 1927, (Local Acts 1927, p. 143) violated Section 281, Constitution, 1901.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

I have your letter of August 27, 1930, in which you request my opinion as to the constitutionality of an Act approved Sept. 25, 1915, (Local Acts 1915, p. 470), as amended by an Act approved August 2, 1927, (Local Acts 1927, p. 143) and also as to the constitutionality of Local Act No. 279 relative to the disposition of gasoline tax, Tuscaloosa County, (Local Acts, 1927, p. 198).

I am of the opinion that the original Act approved Sept. 25, 1915, (Local Acts 1915, p. 470) is a valid enactment and does not offend any constitutional provision.

This identical Act was passed upon by the Supreme Court in the case of *State ex rel Brandon et al v. Prince et al*, 199 Ala. 445, and its constitutional validity upheld.

You next inquire as to the validity of House Bill 324, Local Acts 1927, p. 198, No. 279. This bill became a law under Section 125 of the Constitution. This Act, by both the title and body thereof, seeks to empower the Board of Revenue of Tuscaloosa County to use its portion of the funds derived from the excise tax on gasoline or other liquid motor fuels levied by an Act approved Feb. 10, 1923, (General Acts of Alabama, 1923, p. 36) in paying interest on and establishing a sinking fund for the retirement of certain bonds of Tuscaloosa County sold to provide funds for paving, etc., designated State Aid Public Roads:

Section 8 of the Act of Feb. 10, 1923, *supra*, provided that proceeds of the excise tax prescribed in that Act should be divided between the State and the several counties thereof, one-half of such proceeds to be paid into the State Treasury and credited to the general fund to be used for general state purposes, the other half to be divided and distributed equally among the sixty-seven counties.

By Section 83 of an Act approved August 22, 1923 (General Acts, 1923, p. 152) it was provided that the net proceeds of the excise tax on gasoline or other liquid motor fuels in this State prescribed by the Act of February 10, 1923, *supra*, after the payment of all costs and expenses of administration * * * be divided or distributed equally among the sixty-seven counties and it was further provided that the same could only be expended by the governing bodies of the counties, exclusively for maintenance and repair of roads, highways and bridges. Said Act also provided that should the governing body of any County use the proceeds of such excise tax for any other purpose that the same should constitute a misdemeanor.

By an Act approved August 27, 1927 (General Acts of Alabama, 1927, p. 326) the Act of February 10, 1923, and the title thereof were amended as follows:

"That the title of the above mentioned Act, approved February 10, 1923, shall be made to read as follows: to impose an excise tax on persons, corporations, co-partnerships, companies, agencies, or associations engaged in the business of selling, distributing, storing or withdrawing from storage for any purpose whatsoever gasoline or other liquid motor fuels."

It is to be observed that when House Bill No. 279, *supra*, (Local Acts, 1927, p. 198) became a law under Section 125 of the Constitution of 1901, the law imposing an excise tax on gasoline sold in this State had been amended and the Act of February 10, 1923, and the Act approved August 22, 1923,

(General Acts of Alabama, 1923, pp. 36-152) **had been rendered nugatory by the passage of the Act approved August 27, 1927**, placing a tax on the business of "selling, storing or withdrawing from storage for any purpose whatsoever, gasoline and other motor fuels." Therefore, the Act under which the Board of Revenue of Tuscaloosa County is attempting to use the proceeds of the gasoline tax under the two Acts therein referred to, is without any force or effect and the gasoline tax and funds derived and distributed among the sixty-seven counties of the State under the Act approved August 27, 1927, (General Acts, 1927, p. 326) can only be used for maintenance and repair of roads, highways, and bridges in Tuscaloosa County.

You inquire as to the validity of an Act approved August 2, 1927, (Local Acts 1927, p. 143) to amend the title and Sections 5, 12, 14 and 17 of an Act approved September 25, 1915 (Local Acts 1915, p. 470) increasing the compensation of the members of the Board of Revenue of Tuscaloosa County during their term of office.

I am of the opinion that the amendatory Act of 1927, *supra*, is unconstitutional for the reasons, that, first, it violates Section 281 of the Constitution in increasing the salary of the members of the Board of Revenue during their term of office, and second, that it is merely a colorable pretext to increase the compensation of the members of the Board of Revenue and that the amendatory Act does not place any new duties on the Board of Revenue of Tuscaloosa County.

Section 1347, Code of Alabama, 1923;
Carnley vs. Moore, 218 Ala. 274;
Taylor vs. Davis, 212 Ala., 802, 102 So. 445;
Hill vs. Moody, 207 Ala. 385.

Section 281 of the Constitution of Alabama, 1901, is as follows:

"The salary, fees or compensation of any officer holding any civil office of profit under this state or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

Section 1347 of the Code, *supra*, as re-enacted in Section 157 of an Act approved August 27, 1927 (Alabama Highway Code) clothes the Courts of County Commissioners and Boards of Revenue of the several counties with many duties in relation to roads and bridges, a part of which is as follows:

"To this end they have legislative, judicial and executive power.
* * * Courts of county commissioners and boards of like jurisdiction are courts of unlimited jurisdiction and powers * * * they may establish, promulgate and enforce rules and regulations, make and enter into contracts as may be necessary or as may be deemed necessary or advisable."

The Legislature merely re-enacted Section 1347, *supra*, in the Act of 1927, *supra*.

The amendatory Act of 1927 increasing the salaries of the members of the Board of Revenue and attempting to place extra duties upon them does

not impose any new duties. For instance, Section 1363, Code of Alabama, 1923, (now Section 172, Alabama Highway Code) provides that the Courts of County Commissioners or Boards of Revenue may accept compensation not to exceed \$10.00 per capita per annum for those liable for road duty in lieu of labor required by law upon public roads and provide for the time of payment of same, and that said money shall be placed and used exclusively for the maintenance and improvement of the public roads in the County. Section 1364 of the Code, (now Section 173, Alabama Highway Code), limits the time the persons are to work on the roads and Section 1365, *supra*, (now Section 174, Alabama Highway Code) provides that the Court of County Commissioners or Boards of Revenue shall apply the tax collected in lieu of labor in the road precinct and on the road where the payer is apportioned or resides. That has always been the duty of members of Courts of County Commissioners or Boards of Revenue. It was also the duty of the Court of County Commissioners or members of the Board of Revenue to inspect roads and that duty was incumbent upon such boards prior to the enactment of the amendatory Act of 1927. In this connection Section 6771, Code of Alabama, 1923, provides compensation while said Boards are occupied in the discharge of their duties in "letting out, inspecting and accepting, building or repairing, of any county bridges or county buildings or works, and five cents per mile for each mile necessarily traveled by them in so doing. * * *" And said Section further provides that no allowance shall be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the Commissioners Court previously made. When a member of the Court of County Commissioners or Board of Revenue is engaged in inspection of the roads or any duty pertaining to the county's business he must file claim and the same must be audited and allowed by the Court of County Commissioners before a warrant is drawn for the payment thereof. The amendatory Act provides that "the three members of the Board of Revenue other than the President thereof, shall also personally inspect at least once in every month all of the public roads of the County, and immediately after each inspection shall file a detailed report of the condition of the roads as found by them." That is no new duty. It has always been the duty of the members of like governing bodies when inspecting roads to file a report. If not, then Section 225 of the Code of Alabama, 1923, would have no bearing because that Section is mandatory and declares that no claims against the County shall be passed upon or allowed by the Court of County Commissioners unless it be itemized and sworn to by the claimant or some person in his behalf having personal knowledge of the facts and Section 6771, *supra*, in no unmistakable terms provides that no allowance shall be made for per diem or mileage except when acting under an order of the Court of County Commissioners previously made. That being so, there are no new duties placed upon the Commissioners by the amendatory Act, *supra*.

The opinion of Sept. 16, 1930, addressed to the Chief Examiner, Department of Examiners of Accounts (Vol. 19, office edition) holding that the Local Act approved Sept. 25, 1915, (Local Acts 1915, p. 470) to be unconstitutional

and void is overruled and withdrawn, as it is my opinion as hereinabove stated, that the Local Act approved Sept. 25, 1915, is within the legislative competency and a valid enactment.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Deputy Solicitor,
Athens, Limestone County, Ala.

Stenographer: No authority to pay in habeas corpus or preliminary hearing.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 17, 1928, in which you state that you have had to use a stenographer in taking testimony in a preliminary trial before a committing magistrate, and that you also used a court reporter in taking the testimony on a habeas corpus trial.

You request my opinion:

1. Is there any authority of law to pay the stenographer for taking the evidence in the preliminary trial?
2. Is there any authority of law to pay the court reporter for taking the evidence on a habeas corpus trial?

In answering both of your inquiries will say that I find no authority of law for paying a stenographer for taking this testimony, except the Attorney General may incur expenses necessary in the investigation of crime, but you are not concerned with this.

The duty of taking testimony in a preliminary investigation is placed on the magistrate by Section 5233, Code of Alabama, 1923, which is as follows:

"5233. Testimony of witnesses reduced to writing and subscribed.—The evidence of the witnesses examined, both for state and for the defendant, must be reduced to writing by the magistrate or under his direction, and signed by the witnesses respectively."

Matthew v. the State, 96 Ala. 62.

Sections 6733 and 6742, Code of Alabama, 1923, provide for court reporters, and state their duties and their compensation, and I am unable to find any authority of law authorizing the payment of a court reporter to take

testimony in a habeas corpus matter, unless employed especially to do so, and then this would not be a charge against the county.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

Hon. J. H. Pride,
Circuit Solicitor,
Huntsville, Madison County, Alabama.

Search warrants—how and when served.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of March 15, 1930, in which you state that the sheriff of your county is often called on to serve search warrants on certain premises in your county for prohibited liquors. The party operating the place closes the doors and will not let an officer in after six o'clock in the evening and before eight o'clock in the morning, claiming that they are exempt from search, unless the doors are found open.

You request my opinion:

Can search warrants be served after six o'clock in the afternoon and before eight o'clock in the morning by an officer who has a warrant stating that he has absolute knowledge that on certain premises there are stored prohibited liquors?

If your search warrant is sworn out under Section 4741, Code of Alabama, 1923, and you proceed under provisions of the law made applicable to search warrants for prohibited liquors then you are restricted to all the provisions of law pertaining to such seizure, and under Section 4751, Code of Alabama, 1923, you can only make such search between eight o'clock in the morning and six o'clock in the afternoon or at any other time that the place is open.

But when you have a case as you described, I am of the opinion that the better procedure would be to issue your warrant under the general law pertaining to search warrants and the ground for issuing such warrant is found under Section 5472, Code of Alabama, 1923, third sub-division of this section and this sub-division would cover liquor kept or stored and is as follows:

“(3) Where it is in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it, for the purpose of concealing it, or preventing its discovery.”

In re State ex rel Attorney General, 179 Ala. 639.

If you proceed under the above sub-division then you can make the search under Section 5478, Code of Alabama, 1923, and if your warrant states that the affiant has positive knowledge of the presence of prohibited liquors on said premises then you can proceed to make the search at any time night or day.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

Sept. 30, 1930.

State Tax Commission,
CAPITOL.

Tax assessed upon shares of capital stock of a bank although assessed in the name of the bank is not an assessment against the bank; insolvent bank has no right to pay such assessment; proceedings against stock-holders for collection of tax.

Opinion by Assistant Attorney General Cobb.

Gentlemen:

I have your letter of recent date transmitting request of the Tax Collector of Jefferson County for an official opinion. The following facts appear from the letter of said Tax Collector:

"The Leeds State Bank assessed for the tax year 1929 the following:

Real estate.....	\$ 2,600.00
Personal property.....	200.00
Residue	28,689.00
	31,489.00

"Demand has been made on me by J. M. Pledger, who was formerly cashier of this bank, to separate this tax and allow him to pay the tax on real estate and also the personal property, but advises that the bank will not pay on the residue. He cites Attorney General opinion page 99—Attorney General Reports, October 26—September 30, 1928.

"When this assessment was made no list of stockholders were listed or disclosed, but instead an agreement was signed to the effect that the bank would pay the entire tax.

"The same question, I understand is going to arise with the City Bank and Trust Company and the Avondale Bank and Savings Company, and the Woodlawn Savings Bank, therefore I am also addressing this to the city attorney of Birmingham.

"By reference to Acts, 1923, page 152, Sec. 6, you will find that this expressly provides that the bank SHALL PAY FOR THE SHARE-

HOLDER etc. Also Acts 1919, page 282, Sec. 14, provides for agreement whereby names of stockholders are not disclosed."

You request my opinion:

Please advise me if I shall accept payment on real estate and personal property, leaving balance which represents value of stock? If so, how may I proceed to collect from these stockholders, or ascertain who they are and their respective interests?

Answering your question, I am of the opinion that you should accept payment of tax on real estate and personal property of the bank unless there is a surplus or undivided profits from which this tax on residue can be paid. It appears from your letter that the residue mentioned merely represents the value of the stock of this bank.

The shares of capital stock are not owned by the bank and while they are usually assessed in the name of the bank the assessment of shares of stock is not an assessment against the bank. Under the statute the assessment of the shares of stock **may be made** in the name of the bank and the bank is required to pay the assessment, if it has a surplus or undivided profit out of which such assessment may be paid.

General Acts 1923, p. 152, Section 6.

Shares of stock belong to the shareholder and a bank which has no surplus or undivided profit is without authority to pay taxes on such shares of stock. The shares of stock owned by the stockholders and other property of the stockholders may be levied on and sold for the payment of taxes against said stockholders. In the event a bank is insolvent and the capital stock has no value, then it becomes your duty to proceed against the stockholders for the collection of the tax. That part of Section 6 of an Act approved August 22, 1923, *supra*, which is pertinent to your inquiry, reads as follows:

"For the purpose of determining the value of such shares, the president or managing officer of such bank, or banking association, shall make out and return under oath to the assessor of the county in which such bank is located, and to the State Tax Commission, a list showing the total number of shares of capital of such bank, the name and address of every shareholder, as far as known, the fair and reasonable market value of such shares, and the par value thereof, what sales of stock have been made during the last twelve months, with the names of the sellers and buyers thereof, and the price paid for same, the annual dividends declared upon the stock for the last three years, the value of the shares as shown by the books of the bank by the last report of the officers to the shareholders, the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such president or managing officer shall at the same time in the manner required by law, return to the assessor a statement of all real estate and improvements thereon.

and furniture and fixtures, owned by the bank, situated in this State and liable for taxation."

"It is the intent and meaning of this section that the real estate of every bank shall be assessed against the bank as other real estate in this State is assessed to the owners thereof, and that such bank shall pay the taxes thereon, and that the shares shall be assessed for taxation against the shareholders * * * ."

Opinion to Tax Collector of Geneva County, June 12, 1930, Opinions of Attorney General, (Book 18, p. 167, et seq: office edition).

I rendered an opinion to the Tax Collector of Winston County on Feb. 9, 1927, in which I held, "that assessment against the capital stock of a corporation is primarily an assessment against the individual stockholders of such stock, and the corporation itself would not have authority to pay such tax unless there were a surplus out of which such taxes could be paid. In other words, while the bank has authority to pay the taxes assessed against the stock belonging to the stockholders provided there is money which might be distributed to the stockholders as dividends out of which to pay such taxes, but unless there is such surplus the corporation has no authority to take part of its capital which could not be distributed as dividend and pay such taxes."

Opinion of Attorney General, Biennial Report 1926-28, p. 99.

Opinion rendered Chief Examiner of Accounts on September 30, 1930, Opinions of Attorney General, Book 19, page 307, being in conflict with this opinion the same is hereby overruled and withdrawn.

In order to collect the tax in the instant case from the stockholders; you can procure from the Superintendent of Banks a list of these stockholders against whom you can proceed in accordance with this opinion.

Yours truly,
CHARLIE C. McCALL,
Attorney General.

September 30, 1930.

The Superintendent,
Alabama Boys' Industrial School,
Birmingham, Jefferson County, Alabama.

Juvenile Court: Judge of Probate, acting as Judge of the Juvenile Court, determines a child is delinquent, and so adjudicates, he may order said child committed to Alabama Boys' Industrial School, if a boy, during minority, but not for a definite time less than during minority.

Opinion by the Attorney General.

Dear Sir:

I have your letter of January 11, 1930, enclosing copy of a letter from the County Solicitor of Cleburne County, Alabama, with reference to the commitment of a certain boy to the Alabama Boys' Industrial School. You refer to an opinion rendered by this office to you under date of December 9, 1929, in response to your communication of October 29, 1929, on the same subject. From the correspondence on this matter it appears that on October 21, 1929, the Probate Judge of Cleburne County, Alabama, acting as Judge of the Juvenile Court of said county, committed to the Alabama Boys' Industrial School, a certain boy then fifteen years of age, for a period of twelve months. The order of the court reads as follows:

"This cause coming on to be heard and the said blank (name deleted by me) being present in court and his grandfather being present with him and it appearing to the court that the said blank is a child under the age of sixteen years, to-wit, fifteen years of age and is delinquent according to the petition filed herein and it further appearing to the court that it is to the best interest of the said blank:

"Now therefore, it is hereby ordered and adjudged that the said blank be and he hereby is adjudged a ward of the State and committed to the Alabama Boys' Industrial School for a period of twelve months, beginning October 21, 1929."

In the opinion dated December 9, 1929, *supra*, the answer to your communication of October 29, 1929, it was stated in part as follows:

"* * * that judges of probate, sitting as judges of juvenile courts after complying with Section 3532 of the Code of Alabama, and finding that the child is dependent, neglected, or delinquent, should in pursuance to said section adjudicate and enter judgment to the effect that said child shall, during his minority, be considered a ward of the State and subject to the guardianship of the juvenile court, unless sooner discharged by order and decree of the juvenile court, or other court of competent jurisdiction. Any order or judgment of the court shall be subject to modification from time to time as the court may consider best for the welfare of the child."

This opinion is hereby overruled.

Chapter 100 (Sections 3528-3566) Code of Alabama, 1923, contains the general provisions as to juvenile delinquents. Section 3528 shows that the chapter applies to males and females, regardless of color, under sixteen years of age, with no minimum age. However, in some instances it applies to children between sixteen and eighteen years of age (Section 3539, Code of Alabama, 1923). The words "dependent", "neglected", "delinquent" children, and "court" and "judge" are defined for the purposes mentioned in said chapter (Section 3528, *supra*). Except as may be otherwise provided by special law, the probate judges of the respective counties of Alabama are ex officio judges of the juvenile courts of their respective counties, and have original and exclusive jurisdiction of matters coming under the provisions of Chapter 100, *supra*, (Section 3529).

When the probate judge acts as judge of the juvenile court under Chapter 100, *supra*, his procedure is as follows: He first determines the question of dependency, neglect or delinquency. He thereupon so adjudicates. He then declares the child a ward of the State. He next makes and enters his judgment and orders for custody, etc., as he thinks best for the child (Section 3529). He has the powers of a chancery court as to such child when acting under Chapter 100, *supra*, except as to property rights of the child, (Section 3529, *supra*). The procedure of the probate judge, acting as judge of the juvenile court under Chapter 100, *supra*, is further explained as follows: After he finds the child to be dependent, neglected, or delinquent as defined in Section 3528, *supra*, then, under Section 3532, he must so adjudicate, whereupon, during minority the child is a ward of the State, and subject to the court's guardianship as provided by said Chapter 100, unless sooner discharged by order and decree of the juvenile court or other court of competent jurisdiction, and the court may modify its orders and judgment from time to time (Section 3532). When the court hears a case coming under said Chapter 100, finds the child dependent, neglected or delinquent, and so adjudicates, the court may commit the child to certain approved persons or private institutions, or the court may commit any "delinquent" child to a proper State institution. Commitment to other than a State institution, or to other than the State Child Welfare Department, does not deprive the juvenile court of the jurisdiction and authority to change the form of commitment or transfer custody of the child to some other institution or agency (Section 3537). The immediately foregoing statement, found in Section 3537, *supra*, is a limitation upon Section 3532, *supra*, in that when the juvenile court commits a "delinquent" child to a proper State institution, such as the Alabama Boys' Industrial School, the juvenile court is deprived of jurisdiction and authority to change the form of commitment or to transfer the custody of the child to any other institution or agency. You will observe also that Section 3537, *supra*, provides for commitment of "delinquent" children only, to State institutions, when the probate judge, acting as judge of the juvenile court, is proceeding under Chapter 100, *supra*. A State institution for delinquents cannot release a child committed there under Chapter 100, without first giving ten days written notice to the court making the commitment. This means that where a delinquent child is committed to the Alabama Boys'

Industrial School under Chapter 100, supra, and is later ordered released by the directors thereof, or by the Governor, under Section 697, Alabama School Code, 1927, (formerly Section 63, Code of Alabama, 1923), the executive officer thereof must first give ten days written notice to the committing court. However, the judge of the juvenile court cannot prevent the child from being released from said State institution at the expiration of the ten days, nor can said court release the child therefrom after it has committed the child thereto. The rule is different where the juvenile court, acting under Chapter 100, supra, commits the child elsewhere than to a State institution or the State Child Welfare Department (Sections 697, 701, 704, Alabama School Code, 1927, formerly Sections 63, 67 and 70, Code of Alabama, 1923; also see Section 3537, Code of Alabama, 1923). My reason for referring to the Alabama School Code, as relating to the Alabama Boys' Industrial School, is because Chapter 4 (Sections 55-73, Code of Alabama, 1923) has been superseded by Sections 689-708, inclusive, Alabama School Code, 1927.

Therefore, in view of what I have above stated; and in answer to your question as to whether or not the Juvenile Court of Cleburne County, acting under Chapter 100, Code of Alabama, 1923, could legally commit a child to the Alabama Boys' Industrial School for a period of one year, will state that such cannot legally be done, and so much of the order of the court as attempted to limit the time of commitment to one year is surplusage.

When a juvenile court, acting under Chapter 100, Code of Alabama, 1923, determines a child to be **delinquent**, so adjudicates and orders it committed to the **Alabama Boys' Industrial School**, the law steps in and adds to the commitment the time limit, **which shall be during minority**, and the exclusive method of release, **which shall be by the board of directors of the institution, or the Governor of the State.**

Yours truly,
CHARLIE C. McCALL,
Attorney General.

SOLICITOR'S REPORTS

GENERAL SUMMARY OF CASES OR CIRCUITS, 1928-30

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Fail.	
Abandonment	3	1		2						1
Abduction	1	1					1			
Abortion	7		2	3	2					
Abusive language.....	293	156	35	107	17			18	1	104
Adultery	68	28	11	26	4			13	1	15
Affray	17	9		7	1					9
Aiding an escape.....	25	10	2	10	3		4	5		
Aiding felon to escape.	3		1	2						
Arson	67	18	18	21	8		17		1	
Assault	75	53	5	12	5		1	16	1	27
Assault and battery.....	687	432	52	174	27		5	99	1	283
Assault and battery with weapon.....	204	169	8	25	3			49	5	141
Assault to murder.....	539	242	79	223	25		209	38		29
Assault to ravish.....	53	25	3	21	4		21		1	4
Assault to rob.....	34	27		6	1		26	1		
Assault with weapon.....	198	117	17	35	6			52	6	83
Attempt to bribe.....	1			1						
Attempt to commit abortion.....	1			1						
Attempt to commit arson.....	1			1						
Attempt to commit burglary.....	20	17	2	1				6		12

Attempt to commit felony.....	6	3	1	2	1	1	2
Attempt to commit larceny.....	7	7			4		3
Attempt to commit sodomy.....	2	2			1	1	
Attempt to distill.....	357	350	2	4	1	37	1 318
Attempt to forge.....	6	6				3	2
Attempt to rob.....	1	1				1	
Attempt to transport liquor.....	3	3					3
Attempts.....	44	44				15	29
Bail forfeiture.....	84	72	12				72
Bastardy.....	132	31	16	61	23	8	17
Bigamy.....	28	14	1	9	5	12	
Blackmail.....	3			3		2	
Bookmaking.....	1			1			
Breach of peace.....	10		10				
Breaking boat from mooring.....	1		1				
Bribery.....	7			6	1		
Bringing stolen property into State.....	8	7		1		7	
Burglary.....	922	708	66	124	46	641	33
Burglary and grand larceny.....	386	219	43	103	18	201	8 2 9
Burglary of railroad car.....	4	3			1	3	
Burning forest.....	9	5	3	1			5
Burning insured property.....	1			1			
Buying and concealing stolen property.....	120	93	3	24	1	57	28 1 3
Carnal knowledge.....	100	32	17	40	10	28	2 1
Carrying concealed weapon.....	423	198	49	139	19	5	67 2 154
Challenge to duel.....	1				1		
Changing name.....	1				1		
Compounding felony.....	4	1		3		1	

GENERAL SUMMARY OF CASES OF CIRCUITS, 1928-30—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Concealing a felon.....	1	1		1						
Concealing mortgaged property.....	1	1								1
Concealing stolen property.....	22	15	1	6			6	6		3
Conspiracy.....	7	3	1	2	1			2		1
Conspiracy to commit misdemeanor.....	4	1		3						1
Contempt of court.....	14	7		6	1				4	3
Contributing to delinquency of minor.....	13	1	1	11				1		
Conversion.....	1	1								
Crime against nature.....	4	1	1	1						1
Cruelty to animal.....	9	4		5						4
Decoying child.....	9			9						
Defacing building of another.....	3	2		1				2		
Defacing public building.....	9	7		2				2		5
Defamation.....	3			3						
Desertion.....	40	8	2	29	1			6		2
Desertion and non-support.....	31	8		22	1			7		2
Destroying a lien.....	1			1						
Destroying fence.....	1		1							
Destroying property.....	4	1		3						1
Detaining female.....	1	1								1

[illegible]

BIENNIAL REPORT FOR 1928-1930

GENERAL SUMMARY OF CASES OF CIRCUITS, 1928-30—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Incest	15	6	1	6	2		6			
Indecent exposure of person	1	1								1
Injury to property	4	3		1						3
Interfering with labor	1			1						
Intimidating witness	3			3						
Juvenile delinquent	3				3					
Keeping gaming table	7	3	1	3				2		1
Kidnapping	19	1	2	13	3					
Larceny	11	6	3	1	1			5		2
Larceny and embezzlement	1	1					1			
Leaving wreck without stopping	16	6	3	5	2			6		
Libel	2	1		1						1
Malicious injury to animal	11	4	4	2				3		2
Malicious injury to property	10	4		6				1	2	1
Malicious mischief	24	12	15	12	4			5		7
Manslaughter	269	194	19	27	5		149	26	4	15
Mayhem	2	1		1			1			
Miscegenation	17	10	1	3	2		8			1
Murder	520	218	131	91	24	11	271	1		1
Night walking	1	1						1		

Non-support	22	9	11	2	1	7	2
Obscene language	23	7	3	1			7
Obstructing railroad track	1	1					1
Offenses not specified		31	4	3	8	6	17
Opening grave	2		2				
Operating slot machine	125	63	57	5			63
Operating vehicle as public carrier unlawfully	5		5				
Peace proceedings	8	1	3	4			
Perjury	40	2	9	25	4	2	
Permitting minor to play pool	1		1				
Permitting still on premises	14	12	1	1		1	10
Petit larceny	688	474	48	148	14	13	153
Possessing liquor	6	2	4			2	54
Possessing still	88	60	10	17		55	214
Possessing stolen property	1	1				1	
Practicing dentistry without license	2		2				3
Practicing law without certificate	1	1					1
Practicing medicine without license	1	1					1
Presenting firearms	46	21	6	18	1	4	16
Profanity in presence of female	3	3				1	3
Public drunkenness	327	174	28	125	9	2	6
Rape	52	15	10	26	3	12	154
Receiving deposits for bank	1	1				1	
Receiving stolen property	52	41	4	5	2	16	13
Reckless driving	299	141	71	93	15	1	29
Removing child to prevent appearance in juvenile court	1			1			3
Removing church property	1			1			104
Removing property under lien	16	6	6	3	1	4	
							1

GENERAL SUMMARY OF CASES OF CIRCUITS, 1928-30—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Resisting arrest.....	21	5	4	5	9			1		4
Resisting officer.....	16	4		10	2			1		2
Road default.....	13	1	1	11						1
Robbery.....	249	115	26	101	5		114			
Robbing grave.....	1		1							
Seduction.....	57	5	10	42			6			
Seining.....	12	4	1	7						4
Selling choking animal.....					1					
Selling property under lien.....	22	10	4	7	2		5	2		3
Sending obscene letter.....	3				3					
Sending threatening letter.....	2	1		1					1	
Shooting along highway.....	18	11	1	3	3			1	1	10
Shooting into dwelling.....	14	8	3	2	1			1	1	6
Slander.....	1			1						
Sodomy.....	1	1								1
Temporary use of auto of another.....	20	20						13		8
Temporary use of property.....	14	12	1	1				4		8
Throwing into dwelling.....	3	1	1	1				1		
Transporting dynamite on train.....	1	1								1
Transporting five gallons or more of whiskey.....	319	232	62	83	27		198	5		16

Transporting whiskey.....	28	27		1		14	12		1
Trespass	80	16	21	50	2		3	1	15
Uncoupling trains.....	1		1						
Unlawful injury to animal.....	10	2	3	3	2				2
Unlawful injury to property.....	5	2		2	1				2
Unlawful seizure of property.....	1			1					
Unlawfully cutting timber.....	8	2	2	3	2				2
Unlawfully operating pool room.....	2	1	1				1		1
Unlawfully killing cow.....	1				1				
Unlawfully marking hogs.....	2	1		1					1
Unlawfully riding train.....	5	4			1		1		3
Using auto without owners consent.....	13	9		4			5		6
Vagrancy	311	76	21	181	27		34	10	36
Violating Agricultural Code.....	2			2					
Violating auto law.....	43	23	4	8	7		9	6	8
Violating banking law.....	17	4		13		4			
Violating blue sky law.....	17	1	2	10	4	1			
Violating check law.....	164	70	6	73			33	12	39
Violating election law.....	3			2	1				
Violating game law.....	142	35	41	61	5		1		32
Violating health law.....	15	3	3	8	1		1		2
Violating highway law.....	70	15	16	24	5				16
Violating insurance law.....	2	2					1		1
Violating mining law.....	1	1					1		
Violating narcotic law.....	22	16	1	5		16			
Violating prohibition law.....	4323	2020	403	1745	162	78	690	39	1324
Violating quarantine law.....	21	2	2	16					2
Violating rent contract.....	1		1						

GENERAL SUMMARY OF CASES OF CIRCUITS, 1928-30—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Violating revenue law.....	196	89	17	76	14			11		68
Violating road law.....	62	16	21	19	6					16
Violating school law.....	2	1			1					1
Violating section 3212, Code 1923.....	1				1					
Violating section 3294, Code 1923.....	1	1								
Violating section 3403, Code 1923.....	2	1					1			1
Violating section 3409, Code 1923.....	1									
Violating section 3410, Code 1923.....	1									
Violating section 3452, Code 1923.....	3									
Violating section 3567, Code 1923.....	1	1								1
Violating section 4204, Code 1923.....	2	2								2
Violating section 5405, Code 1923.....	1									
Violating shrimp law.....	4	4						4		
Violating stock law.....	17	4	4	7	2		1	1		2
Violating Sunday law.....	35	9	11	10	5					9
Violating sunset law.....	7	5		2				1	1	3
Violating tick law.....	1		1							
Totals.....	19291	10274	1962	6070	985		8 4247	2063	201	3926

Percentage of convictions, 53.26. Predominant crime, violating prohibition law.

GENERAL SUMMARY OF CASES IN CIRCUITS

FIRST CIRCUIT													
Choctaw County.....	56	30	5	16	5	18	2	2	8				
Clarke County.....	198	124	23	36	15	28	17	2	77				
Washington County.....	185	96	32	48	9	19	9	4	66				
Totals.....	439	250	60	100	29	65	28	8	151				
SECOND CIRCUIT													
Butler County.....	120	91	11	18		42	14		35				
Crenshaw County.....	193	87	17	80	9	25	15		47				
Lowndes County.....	54	38	3	13		18	5		15				
Totals.....	367	216	31	111	9	85	34		97				

GENERAL SUMMARY OF CASES IN CIRCUITS—Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	
						Death.	Peniten- tiary.	Hard Labor.	Jail.		
THIRD CIRCUIT											
Barbour County	174	127	19	28			48	25		54	
Bullock County	105	74	13	17		1	34	11		28	
Dale County	66	45	13	8			23	10		12	
Russell County	211	146	23	42			60	35		51	
Totals	556	392	68	95		1	165	81		145	
FOURTH CIRCUIT											
Bibb County	237	164	17	48	7	1	61	43	5	64	
Dallas County	469	299	29	96	45		120	87	10	148	
Hale County	192	152	8	22	10		45	55	7	103	
Perry County	144	81	10	44	9		27	19	4	52	
Wilcox County	87	57	2	18	7		30	15	2	24	

Totals.....	1129	753	66	228	78	1	283	219	28	391
FIFTH CIRCUIT										
Chambers County.....	91	60	10	19	2	.....	43	11	.....	6
Lee County.....	244	184	14	41	5	.....	146	20	.....	18
Macon County.....	104	76	11	16	1	.....	60	7	.....	9
Randolph County.....	98	73	10	13	2	.....	36	6	.....	31
Tallapoosa County.....	187	132	23	32	4	.....	81	13	.....	38
Totals.....	724	525	68	121	14	.....	366	57	.....	102
SIXTH CIRCUIT										
Tuscaloosa County.....	554	360	42	139	13	.....	153	81	9	155
Totals.....	554	360	42	139	13	.....	153	81	9	155

GENERAL SUMMARY OF CASES IN CIRCUITS—Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	
						Death.	Peniten- tiary.	Hard Labor.	Jail.		
SEVENTH CIRCUIT											
Calhoun County	174	109	18	44	3	.....	56	18	2	33	
Cleburne County	124	77	13	29	5	.....	38	1	1	39	
Talladega County	73	55	8	8	2	.....	30	14	.....	11	
Totals.....	371	241	39	81	10	.....	124	33	3	83	
EIGHTH CIRCUIT											
Cullman County	242	94	21	104	22	.....	34	4	2	55	
Lawrence County	117	64	16	27	16	.....	43	4	2	17	
Limestone County	194	108	23	48	15	.....	67	5	3	37	
Morgan County	315	173	34	79	24	.....	108	8	.....	44	
Totals.....	868	439	94	258	77	.....	252	21	7	153	

NINTH CIRCUIT															
Cherokee County.....	79	43	7	37	2	21	2	1	17						
DeKalb County.....	90	46	5	37	2	26	1	.....	4						
Jackson County.....	143	76	19	45	2	52	7	.....	12						
Marshall County.....	305	84	34	169	22	33	16	4	34						
Totals.....	617	249	65	288	28	132	26	5	67						
TENTH CIRCUIT															
Jefferson County.....	4163	1543	376	2033	107	801	466	14	277						
Totals.....	4163	1543	376	2033	107	801	466	14	277						
ELEVENTH CIRCUIT															
Colbert County.....	323	125	53	112	33	49	25	2	53						
Franklin County.....	55	34	4	13	4	28	.....	.....	5						
Lauderdale County.....	357	163	21	126	48	.....	29	.....	65						
Totals.....	735	322	78	251	87	77	54	2	123						

Fayette County.....	129	71	21	37	.....	14	14	4	38
Lamar County.....	128	61	30	34	2	21	4	.....	37
Marion County.....	174	83	18	76	2	4	8	.....	77
Walker County.....	388	185	63	126	14	55	34	7	120
Winston County.....	202	115	28	59	1	24	12	.....	83
Totals.....	1021	515	160	332	39	118	72	11	355
FIFTEENTH CIRCUIT									
Montgomery County.....	999	707	91	173	28	1	467	102	3 143
Totals.....	999	707	91	173	28	1	467	102	3 143
SIXTEENTH CIRCUIT									
Blount County.....	175	61	27	82	4	10	3	.....	50
Etowah County.....	185	88	29	59	9	38	15	.....	27
St. Clair County.....	235	144	41	44	6	57	21	.....	67
Totals.....	595	293	97	185	19	105	39	.....	144

GENERAL SUMMARY OF CASES IN CIRCUITS—Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	
						Death.	Peniten- tiary.	Hard Labor.	Jail.		
SEVENTEENTH CIRCUIT											
Greene County	87	68	4	15	.....	1	11	1	.....	55	
Marengo County	86	56	7	21	3	2	13	2	.....	39	
Pickens County	100	45	15	36	4	.....	9	5	.....	34	
Sumter County	72	54	2	16	.....	.....	20	9	.....	28	
Totals.....	345	223	28	88	7	3	53	17	.....	156	
EIGHTEENTH CIRCUIT											
Clay County	81	58	7	13	3	.....	28	2	.....	29	
Coosa County	89	66	7	14	2	.....	35	5	.....	27	
Shelby County	306	188	23	83	10	.....	82	11	5	97	

Totals.....	476	312	37	110	15	145	18	5	153
NINETEENTH CIRCUIT									
Autauga County.....	62	43	5	9	5	34	5	3	
Chilton County.....	321	180	33	94	12	18	18	142	
Elmore County.....	153	83	21	32	15	36	17	30	
Totals.....	536	306	59	135	32	88	40	175	
TWENTIETH CIRCUIT									
Geneva County.....	85	50	10	24	1	25	1	25	
Henry County.....	78	50	9	19		25		24	
Houston County.....	201	117	19	65		1	49	19	50
Totals.....	364	217	38	108	1	1	99	20	99

GENERAL SUMMARY OF CASES IN CIRCUITS—Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	
						Death.	Peniten- tiary.	Hard Labor.	Jail.		
TWENTY-FIRST CIRCUIT											
Baldwin County	216	105	25	80	16	.....	36	8	2	59	
Conceh County	166	86	17	55	7	.....	43	9	.....	35	
Escambia County	124	49	12	41	22	.....	30	4	.....	17	
Monroe County	198	112	24	55	7	.....	34	32	.....	47	
Totals.....	704	352	78	231	52	.....	143	53	2	158	
TWENTY-SECOND CIRCUIT											
Covington County.....	427	265	40	114	8	.....	1	59	43	.....	146
Totals.....	427	265	40	114	8	.....	1	59	43	.....	146

TWENTY-THIRD CIRCUIT

Madison County	1681	745	207	545	194	67	185	6	437
Totals	1681	745	207	545	194	67	185	6	437

CIRCUIT COURT OF AUTAUGA COUNTY

Abortion	1	1					1		
Assault and battery	2	1		1				1	
Assault to murder	3	2	1				1	1	
Carrying concealed weapon	2	1		1					1
Defacing building of another	3	2		1				2	
Disposing mortgaged property	1			1					
Distilling	13	12			1		12		
Embezzlement	3			2	1				
False pretense	1				1				
Forgery	1	1					1		
Grand larceny	16	15			1		15		
Malicious injury to animal	1		1						
Murder	3	3					3		
Perjury	1			1					
Pettit larceny	2	1		1				1	
Reckless driving	1		1						

CIRCUIT COURT OF AUTAUGA COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Transporting five gallons or more of whiskey.....	2	2					2			
Violating game law.....	1	1								1
Violating prohibition law.....	5	1	2	1	1					1
Totals.....	62	43	5	9	5		34	5		3

Percentage of convictions, 69.35. Predominant crime, grand larceny.

CIRCUIT COURT OF BALDWIN COUNTY

Abortion	1			1						
Abusive language	3		1	2						
Affray	1			1						
Aiding an escape	1			1						
Assault and battery	8	7	1					2		5
Assault and battery with weapon.....	2	1		1						1

CIRCUIT COURT OF BALDWIN COUNTY—(Continued)

Assault to murder.....	6	1	2	2	1	1	1	1	1
Assault to ravish.....	1	1						1	1
Burglary	13	9		4				9	
Burglary and grand larceny	6	6						6	
Carnal knowledge.....	1				1				
Carrying concealed weapon	4	1	1	2					1
Conspiracy to commit misdemeanor	1	1							1
Disposing mortgaged property	1	1							1
Distilling	1	1						1	
Disturbing assemblage of people	1				1				
Disturbing religious worship	5	2		3				1	1
Embezzlement	1	1						1	
False pretense.....	2			1	1				
Forgery	1	1						1	
Gaming	1			1					
Grand larceny.....	10	6	2	2				6	
Malicious injury to animal	1		1						
Manslaughter	1	1						1	
Murder	7	4	1	2				4	
Petit larceny.....	9	2	2	5					1
Possessing still.....	2	1		1				1	
Presenting firearms	3	1		2					1
Public drunkenness.....	2			2					
Rape	1	1						1	
Receiving stolen property	1			1					

CIRCUIT COURT OF BALDWIN COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Reckless driving.....	3	2		1						2
Resisting arrest.....	1	1								1
Transporting five gallons or more of whiskey.....	7	2		2	3		2			
Trespass.....	3	2		1				1	1	
Unlawfully cutting timber.....	2			1	1					
Violating Agricultural Code.....	1			1						
Violating blue sky law.....	3				3					
Violating health law.....	1	1								1
Violating highway law.....	1			1						
Violating prohibition law.....	91	47	14	35	5		1	4		42
Violating road law.....	3	1		2						1
Violating Sunday law.....	2			2						
Totals.....	216	105	25	80	16		36	8	2	59

Percentage of convictions, 48.15. Predominant crime, violating prohibition law.

Abusive language	6	6							5	4
Adultery	2	1	1						1	
Arson	1		1							
Assault	1	1								1
Assault and battery	6	4		2					1	3
Assault and battery with weapon	12	7		4	1				4	3
Assault to murder	8	5		2	1			4	1	1
Assault to ravish	1			1						
Attempt to commit burglary	1			1						
Attempt to commit sodomy	1	1							1	
Bastardy	1	1								1
Burglary	9	6	1	2				6		
Burning forest	1	1								1
Carnal knowledge	3	2	1					1	1	
Carrying concealed weapon	12	7		5					5	2
Challenge to duel	1			1						
Concealing stolen property	1	1								1
Cruelty to animal	1	1								1
Defacing public building	3	2		1						2
Disposing mortgaged property	2	1		1					1	
Distilling	13	12		1				12		
Disturbing religious worship	1	1								1
Driving while intoxicated	9	2	1	6					1	1
Embezzlement	2			1	1					
False pretense	4	3		1				2		1
Forgery	5	5						4	1	
Grand larceny	18	16		1	1			14		2
Malicious injury to animal	1	1								1
Manslaughter	6	5		1				5		

CIRCUIT COURT OF BIBB COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Murder.....	3	3					3			
Permitting minor to play pool.....	1			1						
Petit larceny.....	5	3		2				1	1	
Possessing still.....	14	8	2	4			7		1	
Public drunkenness.....	17	14		2					1	13
Rape.....	4	4				1	3			
Receiving stolen property.....	1				1					
Reckless driving.....	12	6	4	1	1			2	1	4
Resisting arrest.....	1	1								1
Resisting officer.....	2			2						
Unlawfully killing hog.....	1			1						
Vagrancy.....	3	1	1	1				1		
Violating check law.....	1	1						1		
Violating game law.....	1	1								1
Violating highway law.....	1	1								1
Violating mining law.....	1	1						1		
Violating prohibition law.....	36	28	6	1	1			16		18
Totals.....	237	164	17	48	7	1	61	43	5	64

Percentage of convictions, 69.19. Predominant crime, violating prohibition law.

CIRCUIT COURT OF BLOUNT COUNTY

Abusive language.....	11	4	7							4
Adultery	2	2								2
Assault and battery.....	14	2	3							2
Assault to murder.....	9	2	1							2
Assault to ravish.....	3		3							
Attempt to distill.....	5	5								5
Bail forfeiture.....	2	2								2
Bastardy	5	2	1							2
Burglary	2	2						2		
Burglary and grand larceny.....	1									
Carrying concealed weapon.....	5	4							1	4
Decoying child.....	4									
Desertion	1									
Destroying property.....	1									
Disposing of mortgaged property.....	1									
Distilling	13	6	1	5	1			6		
Embezzlement	4		1	3						
Forfeiture on bond.....	4	4								4
Forgery	3			2	1					
Grand larceny	3	1		2				1		
Manslaughter	1			1						
Murder	6		1	5						
Permitting still on premises.....	12	11	1						1	10
Public drunkenness.....	13	4	3	6						4
Rape	5									
Reckless driving.....	4	2								2

CIRCUIT COURT OF BLOUNT COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequis.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Removing property to defraud.....	4		4							
Resisting officer.....	1			1						
Road default.....	1		1							
Seduction.....	7			7						
Using auto without owner's consent.....	1	1								1
Violating banking law.....	3	1		2			1			
Violating check law.....	1			1						
Violating game law.....	3			3						
Violating prohibition law.....	19	5	3	9	2			1		5
Violating Sunday law.....	1	1								1
Totals.....	175	61	27	82	4		10	3		50

Percentage of convictions, 34.8. Predominant crime, violation prohibition law.

CIRCUIT COURT OF BULLOCK COUNTY

Aiding an escape.....	2	2						2	
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[illegible]

Percentage of convictions, 70.47. Predominant crime, grand larceny.

Murder	5	3	1	1	1	3			
Petit larceny	5	1		4			1		
Transporting five gallons or more of whiskey	3	1		2		1			
Unlawfully riding train	1	1					1		
Violating auto law	1			1					
Violating check law	1	1					1		
Violating game law	5		1	4					
Violating prohibition law	32	28	3	1			8		20
Totals	120	91	11	18		42	14		35

Percentage of convictions, 75.83. Predominant crime, violating prohibition law.

CIRCUIT COURT OF CALHOUN COUNTY

Abusive language	3	2		1					2
Aiding an escape	1	1					1		
Assault	3	3							3
Assault and battery	2	1		1					1
Assault and battery with weapon	6	2	1	3					2
Assault to murder	4	1	1	2		1			
Assault with weapon	1	1							1
Attempt to distill	3	3							3
Bastardy	1			1					
Bigamy	1			1					

CIRCUIT COURT OF CALHOUN COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Fine.	
Bringing stolen property into State.....	3	2		1			2			
Burglary.....	13	11	2				11			
Carnal knowledge.....	1		1							
Carrying concealed weapon.....	1			1						
Disposing mortgaged property.....	3		1	2						
Distilling.....	2	2					2			
Disturbing religious worship.....	2	2								2
Driving while intoxicated.....	1			1						
Embezzlement.....	1			1						
False pretense.....	1	1					1			
Forgery.....	4	1	1	2			1			
Gaming.....	7			7						
Grand larceny.....	37	23	4	8	2		23			
Manslaughter.....	1	1					1			
Murder.....	3		1	2						
Non-support.....	3	1		2				1		
Perjury.....	1	1					1			
Petit larceny.....	11	11						5	2	4
Possessing still.....	1	1					1			
Public drunkenness.....	1	1								1

[illegible]

Percentage of convictions, 62.64. Predominant crime, grand larceny.

CIRCUIT COURT OF CHAMBERS COUNTY

Arson	1	1				1	
Assault and battery	1	1					1
Assault and battery with weapon	5	4		1			4
Attempt to commit sodomy	1	1					1
Burglary	7	5	1	1		5	
Burglary and grand larceny	12	7		4	1	7	
Carnal knowledge	1	1				1	

CIRCUIT COURT OF CHAMBERS COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Carrying concealed weapon.....	2	1	1					1		
Concealing stolen property.....	1	1					1			
Disposing mortgaged property.....	1			1						
Distilling.....	24	19		4	1		19			
Disturbing religious worship.....	1	1						1		
Embezzlement.....	1	1					1			
False pretense.....	1		1							
Forgery.....	1			1						
Grand larceny.....	6	4		2			4			
Grand larceny and embezzlement.....	1	1					1			
Manslaughter.....	1	1					1			
Murder.....	3	1	2				1			
Petit larceny.....	1			1						
Receiving stolen property.....	1	1					1			
Violating auto law.....	1	1						1		
Violating check law.....	3	2		1				2		
Violating prohibition law.....	14	6	5	3				5		1
Totals.....	91	60	10	19	2		43	11		6

Percentage of convictions, 65.93. Predominant crime, distilling.

CIRCUIT COURT OF CHEROKEE COUNTY

Abusive language.....	7	4	1	2				1	1
Adultery	1			1					
Affray	5	5							5
Assault and battery.....	3	2	1						1
Assault to murder.....	2	1	1				1		
Bastardy	1				1				
Burglary	2	2					2		
Carnal knowledge.....	1			1					
Disposing mortgaged property.....	1			1					
Distilling	6	4	1	1			4		
False pretense.....	2	1		1			1		
Forgery	2	1		1			1		
Grand larceny.....	5	4	1				4		
Incest	1			1					
Manslaughter	1			1					
Murder	1	1					1		
Petit larceny.....	2	1		1				1	1
Public drunkenness.....	9	4		4	1				4
Reckless driving.....	1			1					
Temporary use of auto of another.....	1	1						1	
Transporting five gallons or more of whiskey.....	8	7	1				7		
Violating game law.....	2	2							2
Violating prohibition law.....	15	3	1	11					3
Totals.....	79	43	7	37	2		21	2	17

Percentage of convictions, 54.43. Predominant crime, violating prohibition law.

CIRCUIT COURT OF CHILTON COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Abandonment	1	1								1
Abusive language	16	11		5						11
Affray	1	1								1
Assault and battery	27	9	7	11						9
Assault to murder	1				1					
Bastardy	1	1	1							
Burglary and grand larceny	10	4	3		3		4			
Carrying concealed weapon	15	5	5	5						5
Decoying child	1			1						
Desertion and non-support	1	1						1		
Disposing mortgaged property	1				1					
Distilling	12	8	1	2	1		8			
Disturbing religious worship	1			1						
Driving while intoxicated	5	3		2						3
False affidavit	1			1						
Forgery	3	2		1			2			
Grand larceny	3	3					2	1		
Leaving wreck without stopping	1			1						
Malicious injury to animal	1			1						
Malicious injury to property	1			1						

Manslaughter	2	2							1	1	
Murder	2	1						1		1	
Non-support	1							1			
Petit larceny	27	16	1					8	2	7	8
Presenting firearms.....	3	1						2			1
Public drunkenness.....	19	11	3					3	2		11
Reckless driving.....	11	6	4					1			6
Resisting officer.....	3	1						2			
Seduction	1							1			
Trespass	5							5			
Uncoupling trains.....	1							1			
Unlawfully riding trains.....	2	2									2
Vagrancy	4							4			
Violating check law.....	2							2			
Violating highway law.....	2							2			
Violating prohibition law.....	119	81	6					28	2	8	73
Violating revenue law.....	14	11	1					2			11
Totals.....	321	180	33					94	12	18	142

Percentage of convictions, 56.07. Predominant crime, violating prohibition law.

CIRCUIT COURT OF CHOCTAW COUNTY

Assault and battery.....	1	1									1
Assault to murder.....	4	1						3		1	

CIRCUIT COURT OF CHOCTAW COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Assault with weapon.....	2	2						1		1
Attempt to distill.....	2	1		1						1
Bastardy	1				1					
Carrying concealed weapon.....	2	1		1				1		
Detaining female.....	1	1								1
Disposing mortgaged property.....	1			1						
Distilling	7	3		2	2		3			
Grand larceny.....	8	3		4	1		3			
Manslaughter	3	3					3			
Miscegination	1			1						
Murder	8	6	2				6			
Petit larceny.....	2	2							2	
Possessing still.....	1	1					1			
Rape	1	1					1			
Reckless driving.....	1		1							
Robbing grave.....	1		1							
Unlawful injury to animal.....	1			1						
Violating check law.....	1			1						
Violating game law.....	1		1							
Violating prohibition law.....	5	4		1						4

Violating quarantine law.....	1	.....	.....	.....	1	.....	.....	.....	.....
Totals.....	56	30	5	16	5	.....	18	2	8

Percentage of convictions, 53.57. Predominant crimes, murder and grand larceny.

CIRCUIT COURT OF CLARKE COUNTY

Abusive language.....	3	1	2	.....	.....	.....	.....	.....	1
Adultery.....	1	.....	1	.....	.....	.....	.....	.....	.....
Assault and battery.....	4	3	1	.....	.....	.....	.....	.....	3
Assault and battery with weapon.....	10	9	.....	1	.....	.....	3	.....	6
Assault to murder.....	7	3	.....	1	.....	.....	.....	.....	.....
Assault to ravish.....	1	1	.....	.....	.....	.....	1	.....	.....
Assault with weapon.....	2	1	.....	1	.....	.....	.....	.....	.....
Attempt to distill.....	9	9	.....	.....	.....	.....	2	.....	7
Bastardy.....	1	.....	.....	.....	1	.....	.....	.....	.....
Burglary.....	9	7	.....	2	.....	.....	7	.....	.....
Carrying concealed weapon.....	15	10	1	2	2	.....	3	.....	7
Desertion.....	1	.....	.....	.....	1	.....	.....	.....	.....
Discharging firearms unlawfully.....	1	.....	.....	1	.....	.....	.....	.....	.....
Disposing mortgaged property.....	5	.....	.....	3	2	.....	.....	.....	.....
Disposing property under lien.....	1	.....	.....	1	.....	.....	.....	.....	.....
Distilling.....	20	8	4	7	1	.....	8	.....	.....

CIRCUIT COURT OF CLAY COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Violating prohibition law.....	6	—	1	4	1	—	—	—	—	—
Violating road law.....	1	1	—	—	—	—	—	—	—	1
Totals.....	81	58	7	13	3	—	28	2	—	29

Percentage of convictions, 71.60. Predominant crime, distilling.

CIRCUIT COURT OF CLEBURNE COUNTY

Abusive language.....	6	3	—	2	1	—	—	—	—	3
Assault	10	7	—	3	—	—	—	1	—	7
Assault and battery.....	1	—	1	—	—	—	—	—	—	—
Assault to murder.....	2	1	—	1	—	—	—	—	—	1
Assault to ravish.....	1	1	—	—	—	—	1	—	—	—
Attempt to distill.....	18	18	—	—	—	—	—	—	—	18
Bastardy	2	—	1	1	—	—	—	—	—	—

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Percentage of convictions, 62.09. Predominant crime, distilling.

CIRCUIT COURT OF COFFEE COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Abusive language.....	9	3	1	4	1			1		2
Arson.....	1	1			1					
Assault.....	1	1						1		
Assault and battery.....	15	9		3	1			2		4
Assault to murder.....	16	5	2	8	1		4	1		
Bail forfeiture.....	42	31	11							31
Bastardy.....	5		1		4					
Burglary.....	5	2	1	2			2			
Carnal knowledge.....	1	1					1			
Carrying concealed weapon.....	13	3	2	5	2			1		2
Contributing to delinquency of minor.....	2			2						
Desertion.....	3			3						
Disposing mortgaged property.....	2			2						
Disturbing religious worship.....	2	1		1						1
Embezzlement.....	2			2						
False pretense.....	12	3		7	2		2	1		
Forgery.....	7		1	3						
Gaming.....	21	7		5	2			1		6
Grand larceny.....	17	6	3	4	2		6			
Kidnapping.....	1	1								

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CIRCUIT COURT OF COLBERT COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Abandonment	1			1						
Abusive language.....	6	3	1	2				1		2
Adultery	2		1	1						
Aiding an escape.....	8	2	1	2	3		2			
Arson	2	1	1	1						
Assault	5	4		1				1		3
Assault and battery.....	3		2	1						
Assault and battery with weapon.....	4	3	1					2		1
Assault to murder.....	11	4	4	2	1		4			
Assault to ravish.....	1	1					1			
Assault with weapon.....	2	2						1		1
Attempt to distill.....	1	1					1	1		
Bastardy	2		1							
Bribery	1			2						
Burglary	10	7	1	2	1					
Buying and concealing stolen property.....	1			1			7			
Carnal knowledge.....	2			1	1					
Carrying concealed weapon.....	13	6	1	3	3			1		5
Compounding felony.....	1			1						
Concealing stolen property.....	1			1						

Conspiracy to commit felony	1				1								
Cruelty to animal	1				1								
Destroying property	1				1								
Disposing mortgaged property	3			1	2								
Distilling	23	13	3	7	.						13		
Disturbing religious worship	2			1	1								
Driving while intoxicated	1												1
Embezzlement	4				3	1							
Escape	1	1											1
False pretense	10	2											1
Forgery	2				1	1							1
Gaming	2	1			1								1
Grand larceny	18	13	3	2							12		
Keeping gaming table	2				2								
Kidnapping	1					1							
Malicious mischief	1			1									
Manslaughter	5	5									4	1	
Miscegenation	2	1	1								1		
Murder	4	3	1								3		
Petit larceny	8	4	1	3							2	2	2
Presenting firearms	1	1											1
Public drunkenness	11	5	2	4							2		4
Receiving stolen property	1			1									
Reckless driving	9	4	2	3									4
Resisting officer	1	1											1
Robbery	4		2			2							
Seduction	4		2										
Temporary use of property	1												
Transporting five gallons or more of whiskey	19	1		16	2						1		

CIRCUIT COURT OF COLBERT COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Vagrancy	21	7	4	3	7	—	—	3	—	6
Violating check law	4	—	—	2	2	—	—	—	—	—
Violating election law	1	—	—	1	—	—	—	—	—	—
Violating game law	7	—	1	6	—	—	—	—	—	—
Violating health law	1	—	—	1	—	—	—	—	—	—
Violating highway law	3	2	—	1	—	—	—	—	—	2
Violating prohibition law	51	24	14	9	4	—	—	10	—	14
Violating revenue law	8	1	1	6	—	—	—	—	—	1
Violating road law	3	—	—	3	—	—	—	—	—	—
Violating school law	1	—	—	—	1	—	—	—	—	—
Violating Sunday law	3	2	—	—	1	—	—	—	—	2
Totals	323	125	53	112	33	—	49	25	2	53

Percentage of convictions, 38.46. Predominant crime, violating prohibition law.

CIRCUIT COURT OF CONECUH COUNTY

Abusive language	6	1	1	4					1
Adultery	1			1					
Assault and battery	6	2		4					2
Assault and battery with weapon	7	4	1	2			2		2
Assault to murder	6	4	1	1		4			
Assault to rob	1	1				1			
Attempt to commit burglary	1	1					1		
Attempt to distill	4	4					2		2
Bigamy	1								
Burglary	12	10	1	1		10			
Carnal knowledge	1		1						
Carrying concealed weapon	6	2		3	1		1		1
Distilling	15	11	2	2		11			
Driving while intoxicated	1	1					1		
Embezzlement	1			1					
False pretense	4	1	1	2			1		
Grand larceny	8	3		2	3		3		
Larceny	1		1						
Malicious injury to property	1			1					
Manslaughter	2	2				1	1		
Murder	10	8	1	1		8			
Non-support	1			1					
Operating slot machine	3	3							3
Petit larceny	3		1	2					
Possessing still	3	2		1		2			
Public drunkenness	7	2	1	4					2
Reckless driving	1		1						
Shooting along highway	2	2							2

CIRCUIT COURT OF CONECUH COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Transporting five gallons or more of whiskey.....	1	1					1			
Trespass	1			1						
Unlawful injury to animal.....	2	1		1						1
Violating check law.....	5	1		4						1
Violating game law.....	3	1		2						1
Violating prohibition law.....	37	17	3	14	3		2			16
Violating revenue law.....	2	1	1							1
Totals.....	166	86	17	55	7		43	9		35

Percentage of convictions, 51.81. Predominant crime, violating prohibition law.

CIRCUIT COURT OF COOSA COUNTY

Abusive language.....	1	1								1
Assault	1	1								1

CIRCUIT COURT OF COVINGTON COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Abusive language.....	10	4	1	5						4
Adultery.....	1	1						1		
Arson.....	2	1	1				1			
Assault and battery.....	27	20	2	5				4		13
Assault to murder.....	7	3	3	1			4			
Assault to ravish.....	1	1					1			
Bastardy.....	3	1	1		1			1		
Burglary.....	1	1					1			
Burning forest.....	5	2	3							2
Carnal knowledge.....	3	2		1			2			
Carrying concealed weapon.....	17	9	1	7				2		5
Contributing to delinquency of minor.....	2	1		1				1		
Disorderly house.....	1			1						
Disposing mortgaged property.....	7		2	5						
Distilling.....	20	12	3	5			12			
Driving while intoxicated.....	1	1								1
Embezzlement.....	2	1	1							1
Escape.....	7	5		2			5			
False pretense.....	10	4	2	4			2	1		1
Forgery.....	10	4	1	3	2		4			

CIRCUIT COURT OF COVINGTON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Violating stock law.....	2	1			1					1
Violating tick law.....	1		1							
Totals.....	427	265	40	114	8	1	59	43		146

Percentage of convictions, 62.06. Predominant crime, violating prohibition law.

CIRCUIT COURT OF CRENSHAW COUNTY

Abusive language.....	2	2								2
Adultery	1			1						
Arson	2		1	1						
Assault and battery.....	7			6	1					
Assault and battery with weapon.....	5	5						2		3
Assault to murder.....	2	1		1			1			
Attempt to commit burglary.....	1		1							

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Percentage of convictions, 40.41. Predominant crime, violating prohibition law.

CIRCUIT COURT OF CULLMAN COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Pentenary.	Hard Labor.	Jail.	
Abusive language.....	12	3		9						3
Adultery.....	1	1								1
Arson.....	4			3	1					
Assault.....	6	5	1							5
Assault and battery.....	11	4		6						4
Assault to murder.....	11	2		8	1		1	1		4
Assault to ravish.....	2			2						
Assault with weapon.....	6	6								6
Attempt to commit burglary.....	8	7	1							7
Attempt to distill.....	14	14								14
Bastardy.....	3	2			1					
Bigamy.....	2	1			1					
Burglary.....	21	14		6	1		14			
Carnal knowledge.....	2	1		1						
Carrying concealed weapon.....	3	1		1	1		1	1		1
Crime against nature.....	2		1	1						
Disposing mortgaged property.....	5			5						
Distilling.....	23	8	6	7	2		8			
Disturbing religious worship.....	2			2						

Driving while intoxicated.....	2	1	1	1	1	1	1	1	1	1
Escape	2			1	1	1	1	1	1	1
False pretense	10				9	1	1	1	1	1
Forgery	6	1	1	1	3	1	1	1	1	1
Grand larceny	10	4	1	4	1	1	2	2	1	1
Malicious mischief	1	1								1
Manslaughter	3	3					2	2		
Murder	6	1	3	1	1	1	1	1	1	
Non-support	2			1	1	1				
Peace proceedings	1				1	1				
Perjury	2		2							
Petit larceny	9	7		2				1	2	4
Public drunkenness	6	3		3						3
Rape	1			1						
Reckless driving	3			3						
Resisting officer	1			1						
Robbery	2	1		1			1	1		
Seduction	4		1	3						
Selling property under lien	1	1					1	1		
Transporting five gallons or more of whiskey	3	1			2		1	1		
Violating check law	3		1	2						
Violating highway law	2			2						
Violating prohibition law	20	1	3	13	3				1	
Violating road law	2			2						
Violating Sunday law	2			2						
Totals	242	94	21	104	22		34	4	2	55

Percentage of convictions, 39.16. Predominant crime, violating prohibition law.

CIRCUIT COURT OF DALE COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Abusive language.....	2	1	1							1
Arson	3	3					3			
Assault and battery.....	4	3		1						3
Attempt to commit larceny.....	1	1								1
Attempt to distill.....	1	1								1
Attempt to forge.....	1	1						1		
Burglary	5	4	1				4			
Carnal knowledge.....	1	1					1			
Carrying concealed weapon.....	3	1	1	1				1		
Disposing mortgaged property.....	1	1								1
False pretense.....	1	1					1			
Forgery	1	1					1			
Grand larceny.....	7	7					7			
Incest	1	1					1			
Manslaughter	3	3					3			
Murder	2	1	1				1			
Perjury	1			1						
Petit larceny.....	3	1		2				1		
Possessing still.....	1	1					1			

Presenting firearms	1	1						1	
Public drunkenness	2	2							2
Reckless driving									1
Transporting five gallons or more of whiskey	2				1				
Vagrancy	1				1				1
Violating check law	1					1			
Violating rent contract	1				1				
Violating highway law	1					1			
Violating prohibition law	14	9	5					6	3
Totals	66	45	13	8			23	10	12

Percentage of convictions, 68.18. Predominant crime, violating prohibition law.

CIRCUIT COURT OF DALLAS COUNTY

Abusive language.....	2	1	1					1
Adultery.....	3	1	2				1	
Arson.....	1	1					1	
Assault and battery.....	8	5	3				2	5
Assault and battery with weapon.....	22	20	1	1			8	20
Assault to murder.....	16	10	1	5			10	
Assault to ravish.....	2	2					2	
Assault with weapon.....	4	4					2	4
Attempt to distill.....	1	1	1				1	1

CIRCUIT COURT OF DALLAS COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Bastardy	1			1						
Bigamy	1				1					
Burglary	56	34	1	15	6		34			
Carrying concealed weapon	42	32		9	1			11		26
Changing name	1				1					
Disposing mortgaged property	2	1		1				1		
Distilling	48	38	4	5	1		38			
Disturbing religious worship	1	1								1
Driving while intoxicated	5	1	1	2	1			1		1
Embezzlement	26			1	25					
False pretense	5	2		1	2		1	1		
Forgery	14	11		3			4	5	2	
Grand larceny	41	21	16	3	1		21			
Manslaughter	3	3					3			
Miscegenation	4			2	2					
Murder	5	3	1	1			3			
Perjury	1			1						
Permitting still on premises	1	1							1	
Petit larceny	10	10						8	1	1

Possessing still.....	2	2					2	
Public drunkenness.....	1	1					1	
Receiving stolen porperty.....	1	1					1	
Reckless driving.....	7	5	2					5
Removing child to prevent appearance in Juvenile Court.....	1					1		
Removing property under lien.....	1					1		
Robbery	2					2		
Sending threatening letter.....	1	1					1	
Transporting five gallons or more of whiskey.....	1	1					1	
Unlawfully cutting timber.....	2	2						2
Unlawfully killing hog.....	1	1						1
Violating check law.....	1					1		
Violating health law.....	6	1				5	1	
Violating prohibition law.....	101	79	2	20			46	3
Violating revenue law.....	15	2	1	12				
Totals.....	469	299	29	96	45		120	87
								10
								148

Percentage of convictions, 63.75. Predominant crime, violating prohibition law.

CIRCUIT COURT OF DEKALB COUNTY

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CIRCUIT COURT OF DEKALB COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Assault	1	1								1
Assault to murder	3	2		1			1			
Attempt to commit a felony	2	2								2
Bastardy	2	1			1					
Burglary	18	11		7			3			
Carnal knowledge	1			1						
Distilling	34	18	1	15			18			
False pretense	1			1						
Forgery	3	2		1			1	1		
Grand larceny	6	2	2	2			1			
Incest	2	1		1			1			
Manslaughter	1		1							
Miscegenation	2	1		1						
Murder	2	1	1				1			
Perjury	1			1						
Seduction	2			2						
Selling property under lien	1			1						
Transporting five gallons or more of whiskey	4	3			1					
Violating prohibition law	1	1								1

Totals.....	90	46	5	37	2	26	1	4
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Percentage of convictions, 51.11. Predominant crime, distilling.

CIRCUIT COURT OF ELMORE COUNTY

Abusive language.....	2				2			
Adultery	4	1	2		1			1
Assault and battery.....	16	2	1	13				1
Assault to murder.....	9	3	1	5			1	1
Assault to ravish.....	2	2						2
Assault with weapon.....	2		1	1				
Bail forfeiture.....	20	19	1					18
Bastardy	2	1	1					1
Bigamy	3	1			2			1
Burglary	1				1			
Burglary and grand larceny.....	24	11	5	1	5		11	
Carnal knowledge.....	1	1					1	
Carrying concealed weapon.....	4	1	1	1	1			1
Concealing stolen property.....	1	1					1	
Concealing property under lien.....	4	1	1	1	1		1	
Distilling	8	5	1	2			5	
Embezzlement	2		1	1				
Escape	5	4			1			4

CIRCUIT COURT OF ELMORE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
False pretense.....	1	1		1						
Forgery.....	3	3					3			
Grand larceny.....	19	14	3		2		11	2		1
Petit larceny.....	2		2							
Rape.....	1	1					1			
Receiving stolen property.....	1	1					1			
Reckless driving.....	1			1						
Sending threatening letter.....	1			1						
Vagrancy.....	1	1								1
Violating prohibition law.....	13	10		1	2			5		5
Totals.....	153	83	21	32	15		36	17		30

Percentage of convictions, 54.24. Predominant crime, burglary and grand larceny.

CIRCUIT COURT OF ESCAMBIA COUNTY

ATTORNEY GENERAL OF ALABAMA

1099

Abusive language.....	10	1	1	8	2	1	1	1	1
Adultery	1	6	1	1	4	1	1	1	1
Assault and battery.....	7	7	2	2	3	3	2	2	2
Assault and battery with weapon.....	3	3	2	2	1	1	1	2	2
Assault to murder.....	6	6	5	5	1	1	5	5	5
Assault to rob.....	15	15	6	1	4	4	6	6	6
Burglary.....	1	4	1	1	1	1	1	1	1
Burglary and grand larceny.....	4	4	3	3	1	1	3	3	3
Carrying concealed weapon.....	4	4	2	2	2	2	2	2	2
Disposing mortgaged property.....	1	1	1	1	1	1	1	1	1
Driving while intoxicated.....	5	5	2	1	2	2	2	2	2
Forgery.....	13	13	3	3	1	9	3	3	3
Grand larceny.....	3	3	2	1	1	2	2	2	2
Murder.....	6	6	1	1	5	1	1	1	1
Operating slot machine.....	7	7	4	1	1	1	1	1	1
Petit larceny.....	4	4	2	1	1	1	2	2	2
Public drunkenness.....	4	4	2	2	2	2	2	2	2
Seduction.....	10	10	7	1	1	1	7	7	7
Transporting five gallons or more of whiskey.....	3	3	2	3	3	3	3	3	3
Trespass.....	2	2	1	1	1	1	1	1	1
Violating highway law.....	9	9	4	1	3	1	2	2	2
Violating prohibition law.....	124	124	49	12	41	22	30	4	4
Totals.....	17	17	30	4	4	4	4	4	4

Percentage of convictions, 39.57. Predominant crime, burglary.

CIRCUIT COURT OF ETOWAH COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Abusive language.....	5	1	2	2	—	—	—	—	—	—
Assault and battery.....	11	9	—	2	—	—	—	—	—	9
Assault to murder.....	19	12	1	6	2	—	1	2	—	1
Bastardy	4	2	—	1	1	—	—	—	—	1
Burglary	12	10	—	1	—	—	6	4	—	—
Burglary and grand larceny.....	8	7	1	—	—	—	4	1	—	—
Carnal knowledge.....	8	3	2	3	—	—	2	—	—	1
Carrying concealed weapon.....	2	—	—	2	—	—	1	1	—	—
Compounding felony.....	2	—	—	2	—	—	—	—	—	—
Contempt of court.....	1	1	—	—	—	—	—	—	—	—
Decoying child.....	2	—	—	2	—	—	—	—	—	—
Disposing mortgaged property.....	2	—	—	2	—	—	—	—	—	—
Distilling	17	9	4	3	1	—	7	—	—	2
Driving while intoxicated.....	7	1	—	5	1	—	—	—	—	1
Embezzlement	3	2	—	1	—	—	2	—	—	—
Escape	2	—	—	2	—	—	—	—	—	—
False pretense.....	1	—	—	1	—	—	—	—	—	—
Forgery	5	3	1	1	—	—	3	—	—	1
Grand larceny.....	24	10	4	7	3	—	5	5	—	—

CIRCUIT COURT OF FAYETTE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Attempt to distill.....	4	4								4
Attempt to forge.....	1	1						1		
Bastardy.....	2	1		1						1
Carnal knowledge.....	1		1							
Carrying concealed weapon.....	2			2						
Distilling.....	16	8	5	3			8			
Disturbing religious worship.....	1	1								1
False pretense.....	2	1		1				1		
Forgery.....	2	1	1							
Grand larceny.....	7	2	4	1			2			
Malicious injury to property.....	1			1						
Manslaughter.....	3	2	1				1	1		
Murder.....	2	2					2			
Petit larceny.....	8	6	1	1				2	4	4
Presenting firearms.....	1			1						
Public drunkenness.....	4	4								4
Reckless driving.....	4	3	1							3
Seduction.....	1			1						
Unlawful injury to property.....	1	1		1						

CIRCUIT COURT OF FRANKLIN COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequitis.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Removing property under lien.....	2	1	1	1						1
Transporting five gallons or more of whiskey.....	5	4		1			3			1
Totals.....	55	34	4	13	4		28			5

Percentage of convictions, 61.81. Predominant crime, distilling.

CIRCUIT COURT OF GENEVA COUNTY

Assault and battery.....	2	2								2
Assault to murder.....	2	2					2			
Burglary.....	8	8					8			
Carnal knowledge.....	1			1						
Carrying concealed weapon.....	2	1		1						1
Cruelty to animals.....	2			2						

ATTORNEY GENERAL OF ALABAMA

Distilling	1					1				
Driving while intoxicated	1					1				
Embezzlement	1					1				
False pretense	1					1				
Forgery	2					1				1
Grand larceny	6					4				4
Manslaughter	3					2				2
Murder	9					2		1		2
Petit larceny	5					2		3		
Possessing still	2					1				1
Public drunkenness	4					2				
Reckless driving	1					1				
Removing property under lien	2					1		1		1
Selling property under lien	1					1				1
Shooting into dwelling	1					1				
Temporary use of auto of another	1					1				1
Transporting five gallons or more of whiskey	4					3		1		1
Trespass	1					1				1
Violating prohibition law	20					13		4	3	1
Violating stock law	1					1				
Violating Sunday law	1					1				
Totals	85	50	10	24	1		25	1		25

Percentage of convictions, 58.82. Predominant crime, violating prohibition law.

CIRCUIT COURT OF GREENE COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Assault and battery.....	3	3								3
Assault and battery with weapon.....	11	10		1						10
Assault to murder.....	2		1	1						
Attempt to distill.....	1	1								1
Burglary.....	4	2		2			2			
Carrying concealed weapon.....	17	13	1	3						13
Destroying property.....	2			2						
Driving while intoxicated.....	1	1								1
Escape.....	1	1								1
Grand larceny.....	1	1					1			
Manslaughter.....	2	2					2			
Murder.....	8	7	1			1	6			
Petit larceny.....	9	9								9
Public drunkenness.....	1	1								1
Reckless driving.....	2	2								2
Temporary use of auto of another.....	1	1								1
Trespass.....	2	1								1
Violating game law.....	1	1								1
Violating prohibition law.....	18	12	1	5				1		11

Totals.....	87	68	4	15	1	11	1	55
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Percentage of convictions, 78.24. Predominant crime, violating prohibition law.

CIRCUIT COURT OF HALE COUNTY

Abusive language.....	3	2	.....	1	.....	.....	1	.....	2
Adultery	1	1	.....	.....	.....	.....	1	.....	1
Aiding an escape.....	1	1	.....	.....	.....	.....	1	.....	.....
Assault and battery.....	4	4	.....	.....	.....	.....	.....	2	4
Assault and battery with weapon.....	22	20	1	1	.....	.....	10	.....	20
Assault to murder.....	2	2	.....	.....	.....	.....	1	.....	.....
Assault to ravish.....	1	.....	.....	1	.....	.....	.....	.....	.....
Attempt to commit burglary.....	1	1	.....	.....	.....	.....	1	.....	1
Attempt to commit larceny.....	1	1	.....	.....	.....	.....	1	.....	1
Attempt to distill.....	1	1	.....	.....	.....	.....	.....	.....	1
Burglary	15	12	1	1	1	.....	12	.....	.....
Carnal knowledge.....	1	1	.....	.....	.....	.....	1	.....	.....
Carrying concealed weapon.....	13	10	2	1	.....	.....	5	1	10
Disposing property under lien.....	4	3	1	.....	.....	.....	2	.....	1
Distilling	8	5	2	1	.....	.....	5	.....	.....
Embezzlement	1	1	.....	.....	.....	.....	.....	1	1
Escape	1	.....	.....	1	.....	.....	.....	.....	.....
False pretense.....	6	4	2	.....	.....	.....	1	3	3

CIRCUIT COURT OF HALE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Grand larceny.....	18	9	1	6	2	—	9	—	—	—
Juvenile delinquent.....	1	—	—	—	1	—	—	—	—	—
Manslaughter.....	2	2	—	—	—	—	1	—	1	1
Murder.....	7	5	1	—	1	—	5	—	—	—
Petit larceny.....	13	11	1	1	—	—	—	9	1	10
Possessing still.....	8	7	—	1	—	—	7	—	—	—
Public drunkenness.....	1	1	—	—	—	—	—	—	—	1
Receiving stolen property.....	3	2	1	—	—	—	—	1	—	2
Reckless driving.....	14	12	—	2	—	—	—	2	2	12
Shooting into dwelling.....	2	2	—	—	—	—	—	—	1	1
Trespass.....	1	—	—	1	—	—	—	—	—	—
Using auto without owner's consent.....	1	1	—	—	—	—	—	1	—	1
Vagrancy.....	2	2	—	—	—	—	—	1	—	1
Violating check law.....	6	5	—	1	—	—	—	—	—	5
Violating prohibition law.....	27	24	—	2	1	—	—	15	1	24
Totals.....	192	152	8	22	10	—	45	55	7	103

Percentage of convictions, 79.16. Predominant crime, violating prohibition law.

CIRCUIT COURT OF HENRY COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Violating game law.....	1		1							
Violating prohibition law.....	16	11	3	2						11
Violating road law.....	1			1						
Totals.....	78	50	9	19			25			24

Percentage of convictions, 64.10. Predominant crime, violating prohibition law.

CIRCUIT COURT OF HOUSTON COUNTY

Abduction	1	1					1			
Abusive language.....	3	1		2						1
Adultery	2	1		1				1		
Arson	1			1						
Assault	1			1						

Assault and battery.....	8	5	1	2					4
Assault and battery with weapon.....	15	12	1	2			2		10
Assault to murder.....	8	3	1	4			3		
Assault to ravish.....	2			2					
Bigamy	2			2					
Burglary	13	11		2			11		
Burning insured property	1			1					
Carnal knowledge.....	3			3					
Carrying concealed weapon.....	4	2		2					2
Cruelty to animals.....	1	1		1					1
Distilling	1	1					1		
Disturbing religious worship.....	1			1					
Driving while intoxicated.....	1			1					
Embezzlement	3		2	1					
Forgery	6	3		3			3		
Fraud	2		1	1					
Grand larceny	26	18	3	5			18		
Keeping gaming table.....	1	1							1
Malicious injury to animal.....	2	1	1				1		
Manslaughter	2	2					1		1
Murder	6	4	2				1	3	
Non-support	1	1					1		
Petit larceny	10	4	1	5				2	2
Possessing still.....	1	1					1		
Public drunkenness	2	1		1					1
Rape	3	1	1	1			1		
Reckless driving.....	1	1							1
Removing property under lien.....	2	2					2		

CIRCUIT COURT OF HOUSTON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Robbery	1	1					1			
Seduction	1			1						
Selling property under lien	2	2					1	1		
Shooting along highway	1			1						
Transporting five gallons or more of whiskey	15	14		1			2	1		11
Vagrancy	2			2						
Violating election law	1			1						
Violating game law	2		2							
Violating highway law	1			1						
Violating prohibition law	35	20	2	13				10		13
Violating revenue law	1			1						
Violating road law	3	2	1							2
Totals.....	201	117	19	65			1	49	19	50

Percentage of convictions, 58.20. Predominant crime, violating prohibition law.

CIRCUIT COURT OF JACKSON COUNTY

Abusive language.....	4	1	1	2						
Affray	1			1						
Aiding an escape.....	2	1		1						
Assault and battery.....	9	4		5					2	1
Assault to murder.....	6	2	3	1				2		
Assault to ravish.....	1	1						1		
Bastardy	2	1	1						1	
Burglary	20	19	1					19		
Carnal knowledge.....	1			1						
Carrying concealed weapon.....	3		2	1						
Concealing stolen property.....	1	1							1	
Disorderly house.....	1	1							1	
Distilling	29	19		8	1			19		
Driving while intoxicated.....	6	3		3					1	2
Embezzlement	1			1						
False pretense.....	3		1	1	1					
Forgery	2	2						2		
Gaming	3		3							
Impersonating officer.....	1	1							1	
Injury to property.....	1			1						
Larceny	6	3	2	1				2		2
Malicious injury to animals.....	1		1							
Murder	6	5		1				5		2
Public drunkenness.....	6	5	1							
Transporting five gallons or more of whiskey.....	2	2						2		

CIRCUIT COURT OF JACKSON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Trespass	2				2					
Violating check law.....	1				1					
Violating prohibition law.....	16	4	1	11						4
Violating road law.....	1			1						
Violating school law.....	1	1								1
Violating stock law.....	4		2	2						
Totals.....	143	76	19	45	2		52	7		12

Percentage of convictions, 53.14. Predominant crime, distilling.

CIRCUIT COURT OF JEFFERSON COUNTY

Abusive language.....	8	3	2	3				1		2
Adultery	5			5						

CIRCUIT COURT OF JEFFERSON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Contempt of court.....	1	1							1	
Contributing to delinquency of minor.....	9		1	8						
Defamation.....	2			2						
Desertion.....	30	3	2	25				3		
Desertion and non-support.....	28	6		21	1			6		1
Disposing mortgaged property.....	3			2	1					
Disposing property under lien.....	2			1						
Distilling.....	202	86	42	60	13		84	2		
Disturbing woman.....	1			1						
Driving while intoxicated.....	4		2	2						
Dynamiting under dwelling.....	1	1					1			
Embezzlement.....	53	17	3	32	1		12	3	1	2
Escape.....	6	2		4				2		
Failure to deliver mortgaged vehicle as agreed.....	3	1		2						1
False pretense.....	26	5	3	13	5		2	3		1
Forgery.....	162	87	2	71	2		55	31		1
Gaming.....	12			12						
Grand larceny.....	511	253	40	199	13		193	60		
Incest.....	2	1		1			1			

Kidnapping	15		1	12	2				
Libel	2	1		1					1
Malicious injury to animal	2	1							1
Malicious mischief	8	2	1	3	2				2
Manslaughter	60	48		11	1		35	9	2
Mayhem	1			1					5
Miscegination	2	2					2		
Murder	114	44	26	33	9	2	44		
Non-support	2			2					
Operating vehicle as public carrier unlawfully	5			5					
Perjury	7		2	4	1				
Petit larceny	151	111	8	32				101	2
Presenting firearms	1			1					23
Public drunkenness	21	3	1	17					3
Rape	9	1	4	5	1		1		
Reckless driving	54	8	26	20				3	5
Resisting officer	7	1	4	2					1
Robbery	174	75	10	87	2		75		
Seduction	3			3					
Selling or exchanging choking mule	1			1					
Selling property under lien	1	1						1	
Transporting five gallons or more or whiskey	140	81	15	38	6		81		
Trespass	5			5					
Using auto without owner's consent	6	5		1				3	2
Vagrancy	159	13	7	132	7			10	3
Violating Agricultural law	1			1					
Violating banking law	2	1		1			1		
Violating blue sky law	14	1	2	10	1		1		

CIRCUIT COURT OF JEFFERSON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to			
						Death.	Peniten- tiary.	Hard Labor.	Jail.
Violating check law	27	4	2	21				2	3
Violating game law	15	2		10	3			1	1
Violating highway law	4			3					1
Violating prohibition law	1217	227	101	780	19			118	122
Violating revenue law	16	5	1	9	1			2	2
Violating section 3403, Code 1923	2	1		1			1		
Violating section 3409, Code 1923	1			1					
Violating section 3410, Code 1923	1			1					
Violating section 3452, Code of 1923	3			3					
Violating section 5405, Code 1923	1			1					
Violating stock law	2			2					
Totals	4163	1543	376	2033	107		801	466	14
									277

Percentage of convictions, 37.06. Predominant crime, violating prohibition law.

CIRCUIT COURT OF LAMAR COUNTY

ATTORNEY GENERAL OF ALABAMA

1119

[illegible]

Percentage of convictions, 47.65. Predominant crime, violating prohibition law.

CIRCUIT COURT OF LAUDERDALE COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Abusive language.....	5	1		3	1			1		
Adultery	2		2							
Affray	3	1		2						1
Aiding an escape.....	3	1	1	1			1			
Assault	6	4	1	1						4
Assault and battery.....	4	4						1		3
Assault and battery with weapon.....	15	11		4				3		8
Assault to murder.....	6	3	1	2			3			
Assault to ravish.....	1	1					1			
Bail forfeiture.....	1	1								1
Bigamy	1			1						
Burglary and grand larceny.....	21	13	2	5	1		13			
Carnal knowledge.....	3	1	1	1			1			
Carrying concealed weapon.....	3	1		2						1
Disposing mortgaged property.....	1			1						
Distilling	9	4	1	3	1		3			
Disturbing religious worship.....	2		1	1						
Driving while intoxicated.....	17	7	1	9				4		2
Embezzlement	11	2		9			2			

False pretense.....	4	1	2	1	1	1	
Forgery	5	2	1	2	2	.....	
Gaming	7	.....	7	.....	.....	.....	
Grand larceny.....	32	15	10	7	15	.....	
Injury to property.....	1	1	.....	.....	.....	1	
Intimidating witness.....	2	.....	2	.....	.....	.....	
Leaving wreck without stopping.....	2	.....	2	.....	.....	.....	
Manslaughter	3	3	.....	.....	2	1	
Murder	5	1	1	3	1	.....	
Perjury	2	.....	1	1	.....	.....	
Petit larceny.....	14	5	2	5	2	1 5 3	
Possessing still.....	10	7	1	2	7	.....	
Presenting firearms.....	1	1	.....	.....	.....	1	
Public drunkenness.....	16	8	7	1	.....	8	
Receiving stolen property.....	4	3	1	.....	3	.....	
Reckless driving.....	2	2	.....	.....	1	1	
Resisting officer	4	.....	.....	4	.....	.....	
Robbery	1	1	.....	.....	1	.....	
Shooting along highway.....	4	.....	.....	4	.....	.....	
Transporting five gallons or more of whiskey.....	5	3	1	1	3	.....	
Trespass	1	.....	.....	1	.....	.....	
Vagrancy	41	27	3	11	.....	8 9 12	
Violating banking law.....	12	2	10	.....	2	.....	
Violating check law.....	4	3	1	.....	1	2	
Violating election law.....	1	.....	.....	1	.....	.....	
Violating game law.....	4	1	3	.....	.....	1	
Violating health law.....	3	.....	2	1	.....	.....	
Violating highway law.....	1	.....	1	1	.....	.....	

CIRCUIT COURT OF LAUDERDALE COUNTY— (Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Violating prohibition law.....	52	22	3	19	8	.....	.....	7	.....	15
Totals.....	357	163	21	126	48	.....	.....	29	.....	65

Percentage of convictions, 45.66. Predominant crime, violating prohibition law.

CIRCUIT COURT OF LAWRENCE COUNTY

Arson	2	1	1	.....	.....	.....	.....	1	.....	.....	.....
Assault	1	1	.....	.....	.....	.....	.....	1	.....	.....	.....
Assault and battery.....	1	1	.....	.....	.....	.....	.....	.....	.....	.....	1
Assault to murder.....	12	8	2	1	1	.....	7	.....	.....	.....	1
Assault with weapon.....	4	4	.....	.....	.....	.....	.....	.....	.....	.....	4
Attempt to commit burglary.....	1	1	.....	.....	.....	.....	.....	.....	.....	.....	1
Attempt to distill.....	7	7	.....	.....	.....	.....	.....	3	.....	.....	5

Bastardy	4	1	3				1		1
Bigamy	2	1	1						
Burglary	13	6	6	7			6		
Disposing property under lien	1	1						1	1
Distilling	32	17	6	7	2		16		1
False pretense	4	2		1	1		2		
Forgery	2	1		1			1		
Grand larceny	4	3		1			3		
Incest	1	1					1		
Manslaughter	2	1		1			1		
Murder	9	5	2	1	1		5		
Non-support	2	1		1					1
Perjury	1			1					
Petit larceny	1	1						1	1
Rape	3		2		1				
Seduction	2			2					
Violating game law	3		3						
Violating road law	3				3				
Totals	117	64	16	27	16		43	4	2 17

Percentage of convictions, 54.70. Predominant crime, distilling.

CIRCUIT COURT OF LEE COUNTY

Abusive language.....	1	1					1
Arson	1	1					1

CIRCUIT COURT OF LEE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Assault	1	1						1		
Assault and battery	1		1							
Assault and battery with weapon.....	1	1								1
Assault to murder	7	5		2			4	1		
Attempt to distill	1	1					1	1		
Bastardy	1			1						
Bringing stolen property into State	1	1					1			
Burglary	31	29	1	1			29			
Carnal knowledge	2	1	1	1			1			
Carrying concealed weapon	3	2		1						2
Compounding felony	1	1						1		
Disposing mortgaged property	2		2							
Distilling	76	63	3	9	1		63			
Embezzlement	2			2						
False pretense	1	1						1		
Grand larceny	28	25		3			25			
Manslaughter	9	8			1		8			
Murder	13	8	4	1			8			
Operating slot machine	1	1								1

Petit larceny.....	11	8	3				6	2
Possessing still.....	3	3				3		
Public drunkenness.....	1	1						1
Receiving stolen property.....	4	3	1			2		1
Reckless driving.....	2		2					
Robbery.....	1	1				1		
Shooting along highway.....	1			1				
Trespass.....	1	1						1
Violating prohibition law.....	36	17	2	15	2		9	8
Totals.....	244	184	14	41	5	146	20	18

Percentage of convictions, 75.46. Predominant crime, distilling.

CIRCUIT COURT OF LIMESTONE COUNTY

Abusive language.....	2	2						2
Arson.....	1				1			
Assault.....	3	1		2				1
Assault and battery.....	4	4					3	4
Assault to murder.....	12	4	3	3	2		2	2
Assault to ravish.....	3	2			1		2	
Assault with weapon.....	1	1					1	
Attempt to commit burglary.....	2	2						2
Attempt to distill.....	9	9						9

CIRCUIT COURT OF LIMESTONE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Attempt to forge.....	2	2	1							2
Bigamy	1	1								
Burglary	16	12		1	3		12			
Carrying concealed weapon.....	3	1		1	1					1
Destroying a lien.....	1			1						
Destroying fence.....	1	1	1							
Disposing mortgaged property.....	1	1								1
Distilling	48	31	4	12	1		28			3
Driving while intoxicated.....	1	1								1
False pretense.....	2			2						
Forgery	16	11		4	1		11			
Grand larceny.....	12	4		5	3		4			
Incest	1			1						
Manslaughter	2	2					2			
Murder	7	5	2				5			
Perjury	3			3						
Petit larceny.....	6	2	1	3					2	1
Possessing still.....	1	1					1			
Public drunkenness.....	4	3	1							3

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Percentage of convictions, 55.67. Predominant crime, distilling.

CIRCUIT COURT OF LOWNDES COUNTY

Arson	1	1					
Assault and battery	2	2					2
Assault and battery with weapon	4	4					1
Assault to murder	4	2		2			2
Assault with weapon	1	1					1
Burglary	8	6		2			6
Carrying concealed weapon	3	1		2			1
Concealing stolen property	1	1					1
Distilling	4			1	3		

CIRCUIT COURT OF LOWNDES COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Grand larceny.....	6	6					6			
Manslaughter	1	1					1			
Murder	3	3					3			
Petit larceny.....	4	4						1		3
Presenting firearms.....	1	1						1		
Receiving stolen property.....	1	1								1
Reckless driving.....	1			1						
Trespass	2			2						
Unlawfully cutting timber.....	1		1							
Violating prohibition law.....	6	5		1						6
Totals.....	54	38	3	13			18	5		15

Percentage of convictions, 70.37. Predominating crime, burglary.

CIRCUIT COURT OF MACON COUNTY

Aiding an escape.....	1			1						
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Percentage of convictions, 73.08. Predominating crime, grand larceny.

CIRCUIT COURT OF MADISON COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequites.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Abusive language.....	17	2	2	7	6					
Adultery.....	5	3		2				2		
Affray.....	3			2	1					
Aiding an escape.....	1			1						
Arson.....	2				2					
Assault.....	13	5	3		5			1		1
Assault and battery.....	33	14	3	4	12			4	1	7
Assault to murder.....	28	8	6	8	4		10			
Assault to ravish.....	1	1							1	1
Assault with weapon.....	24	5	3	11	5			1		4
Attempt to commit larceny.....	1	1								
Attempt to distill.....	12	12						1		10
Attempt to forge.....	1	1								
Attempt to transport liquor.....	1	1								1
Bastardy.....	2	1		1						
Bigamy.....	1	1					1			
Breach of peace.....	1			1						
Bribery.....	1			1						
Burglary.....	14	10		1	3		10			

Burglary and grand larceny.....	19	13	1	1	4	12			
Carnal knowledge.....	4	1			3	1			
Carrying concealed weapon.....	60	24	11	20	5	4	7		15
Concealing stolen property.....	4	2		2		1			
Desertion.....	1	1					1		
Disposing mortgaged property.....	7	5		2		1	1		3
Distilling.....	32	12	7	7	6	10			
Disturbing school.....	5			4	1				
Disturbing religious worship.....	3	2	1			1			2
Driving while intoxicated.....	51	11	7	27	6		3		8
Embezzlement.....	7	2	1		4	2			
False pretense.....	4	2		1	1	1	1		
Falsifying record.....	1				1				
Forgery.....	13	7	1	1	4		2		
Fornication.....	1	1					1		
Gaming.....	12		7	5					
Grand larceny.....	25	9	2	9	5	5			
Incest.....	1				1				
Indecent exposure of person.....	1	1							1
Larceny.....	1	1				1			
Leaving wreck without stopping.....	3		1	1	1				
Malicious mischief.....	23	5	9	7	2		4		1
Manlaughter.....	6	3	3			2			3
Miscegination.....	2	2				2			
Murder.....	12	2	4	3	3	1	1		1
Obscene language.....	20	6	2	11	1				6
Operating slot machine.....	58	33		24	1				33
Perjury.....	11		4	6	1				

CIRCUIT COURT OF MADISON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Petit larceny.....	28	13	4	6	5			8	2	2
Practicing law without certificate.....	1	1								1
Public drunkenness.....	22	6	4	9	3			1		4
Reckless driving.....	56	24	9	22	11			5		17
Removing property under lien.....	1				1					
Resisting officer.....	10	2	3	2	5			1		1
Robbery.....	1				1					
Seining.....	3	3								3
Shooting along highway.....	3	2			1					2
Shooting into dwelling.....	1		1							
Temporary use of property.....	3	3						1		2
Transporting dynamite on train.....	1	1								1
Transporting five gallons or more of whiskey.....	11	4	3	2	2		2	2		
Unlawfully operating pool room.....	1		1							
Unlawful riding train.....	2	1			1					1
Unlawful seizure of property.....	1				1					
Vagrancy.....	75	18	7	37	13			5		13
Violating check law.....	2	2						2		
Violating game law.....	6	4	1	1						4

	1	8	19	1			
Violating health law.....	1						
Violating highway law.....	41	8	13	19	1		8
Violating prohibition law.....	749	382	67	248	52	114	237
Violating revenue law.....	92	54	6	23	9	16	37
Violating Sunday law.....	17	4	9	3	1		4
Violating sunset law.....	5	3		2			3
Totals.....	1681	745	207	545	194	67	437

Percentage of convictions, 44.31. Predominant crime, violating prohibition law.

CIRCUIT COURT OF MARENGO COUNTY

Assault and battery.....	4	4					1	3
Assault and battery with weapon.....	4	4						4
Assault to murder.....	1		1					
Attempt to distill.....	11	10						10
Attempt to transport liquor.....	1	1						1
Burglary.....	12	4	2	6			4	
Carrying concealed weapon.....	5	4		1				4
Defacing building of another.....	1	1						1
Distilling.....	4	3	1				3	
Driving while intoxicated.....	1	1						1
Grand larceny.....	11	5	1	3	2		5	
Manslaughter.....	3	1	1	1			1	1

CIRCUIT COURT OF MARENGO COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Murder	7	3	2	1	1	2	1	—	—	—
Petit larceny	9	8	—	1	—	—	—	—	—	8
Reckless driving	2	2	—	—	—	—	—	—	—	2
Violating prohibition law	10	4	—	6	—	—	—	—	—	4
Totals	86	56	7	21	3	2	13	2	—	39

Percentage of convictions, 63.62. Predominant crime, burglary.

CIRCUIT COURT OF MARION COUNTY

Abusive language	10	5	1	4	—	—	—	—	—	5
Adultery	1	—	—	1	—	—	—	—	—	—
Assault	1	1	—	—	—	—	—	—	—	1
Assault and battery	15	11	2	2	—	—	—	—	—	11

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Percentage of convictions, 47.70. Predominant crime, violating prohibition law.

CIRCUIT COURT OF MARSHALL COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Abusive language.....	19	8	2	13				1		3
Adultery	2			2						
Affray	1			1						
Assault and battery.....	19	7	2	9				2		6
Assault to murder.....	10	1	1	7	1		1			
Assault to ravish.....	1			1						
Assault to rob.....	1			1						
Assault with weapon.....	1	1								1
Attempt to commit larceny.....	1	1						1		
Bastardy	4	1		2	1					1
Burglary	4	1		3			1			
Carnal knowledge.....	4			4						
Carrying concealed weapon.....	10		2	8						
Contempt of court.....	1				1					
Decoying child.....	1			1						
Desertion	4	4						2		2
Disposing mortgaged property.....	3			2	1					
Distilling	20	5	3	10	2		5			
Disturbing religious worship.....	8		3	3	2					

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CIRCUIT COURT OF MARSHALL COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Violating Sunday law.....	1	1								1
Totals.....	305	84	34	169	22		33	16	4	34

Percentage of convictions, 27.54. Predominant crime, violating prohibition law.

CIRCUIT COURT OF MOBILE COUNTY

Abortion	2					2					
Abusive language.....	8	6	1			1		3	1	2	
Adultery	7	4	2			1		2	1	1	
Arson	1	1					1				
Assault	1	1						1			
Assault and battery.....	58	38	1	12	7			13	14	11	
Assault to murder	18	14	1	1	2		10	4			

Assault to ravish.....	3	3					3	
Assault with weapon.....	42	36	4	1	1		28	5
Attempt to commit arson.....	1			1				
Attempt to distill.....	11	11					6	1
Bastardy	2	2					1	1
Burglary	90	85	4	1			75	10
Burglary and grand larceny.....	6	6					6	
Carnal knowledge	3	1	1		1		1	
Carrying concealed weapon.....	11	10	1				6	1
Conspiracy to commit misdemeanor.....	1			1				3
Contempt of court.....	4	4						2
Crime against nature.....	2	1			1			2
Distilling	65	59	2	2	2		49	10
Disturbing religious worship.....	1	1					1	
Driving while intoxicated.....	45	40	1	1	3		29	4
Embezzlement	7	5		1	1		3	2
False pretense.....	1			1				
Forgery	49	38		3	8		23	4
Grand larceny.....	75	58	6	6	5		44	11
Incest	2	1			1		1	
Leaving wreck without stopping.....	8	6		1	1		6	
Malicious injury to property.....	3	3						1
Manslaughter	9	5	2	1	1		2	2
Murder	13	11	1	1		3	8	1
Petit larceny.....	32	30		2			13	14
Public drunkenness.....	4	2		2			1	3
Rape	4			2			1	1
Receiving stolen property.....	17	16		1	2			

CIRCUIT COURT OF MOBILE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to			
						Death.	Peniten- tiary.	Hard Labor.	Jail.
Reckless driving.....	15	13			2			12	1
Robbery.....	10	8	1		1		8		
Selling property under lien.....	4	2		1	1				2
Shooting along highway.....	1		1						
Shooting into dwelling.....	1	1						1	
Temporary use of auto of another.....	4	4						4	
Transporting whiskey.....	24	23		1			11	12	
Trespass.....	13	9	4					2	7
Vagrancy.....	7	3	1	2	1			2	1
Violating auto law.....	24	19	3	1	1			8	5
Violating check law.....	25	25						8	5
Violating game law.....	2		2						
Violating insurance law.....	1	1						1	
Violating prohibition law.....	191	153	9	18	11		38	72	17
Violating revenue law.....	11	6	2	3				1	5
Violating section 3212, Code 1923.....	1				1				
Violating section 3294, Code 1923.....	1	1							1
Violating section 3567, Code 1923.....	1	1							1
Violating section 4204, Code 1923.....	2	2							2

Violating shrimp law.....	4	4							4		
Violating stock law.....	4	1			1	2			1	1	
Totals.....	952	744	47	71	60			299	294	97	81

Percentage of convictions, 78.15. Predominant crime, violating prohibition law.

CIRCUIT COURT OF MONROE COUNTY

Abusive language.....	1	1									1
Assault and battery.....	8	5	1	2					4		2
Assault and battery with weapon.....	8	8									8
Assault to murder.....	5	4		1				4			
Assault with weapon.....	4	1	1	2							1
Attempt to distill.....	3	3							1		2
Bastardy.....	1				1						
Burglary.....	2	2						2			
Burglary and grand larceny.....	4	1		3				1			
Carrying concealed weapon.....	9	4	2	2	1				1		3
Disposing mortgaged property.....	2	1		1							1
Distilling.....	4	3		1				3			
Driving while intoxicated.....	1	1									1
Embezzlement.....	1			1							
False pretense.....	7	1		6							1

CIRCUIT COURT OF MONROE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Forgery	3	1		1	1		1			
Grand larceny	3	3					3			
Malicious injury to property	4			4						
Manslaughter	12	11	1				11			
Murder	11	4	3	4			4			
Petit larceny	10	4	3	2	1			3		1
Possessing still	5	4	1				4			
Practicing dentistry without license	2			2						
Presenting firearms	1			1						
Public drunkenness	1			1						
Reckless driving	2	1		1						1
Selling property under lien	2			2						
Shooting into dwelling	1		1							
Temporary use of property	1	1								1
Transporting five gallons or more of whiskey	2	1	1				1			
Trespass	1									
Violating game law	5		3	2						
Violating highway law	1		1							
Violating prohibition law	68	46	4	15	3			23		23

Violating road law.....	2	1	1	1	1
Violating Sunday law.....	1			1	
Totals.....	198	112	24	55	7
					34. 32
					47

Percentage of convictions, 56.36. Predominant crime, violating prohibition law.

CIRCUIT COURT OF MONTGOMERY COUNTY

	32	32					11	3	18
Assault and battery.....	32	32							
Assault to murder.....	32	22	4	6			20	1	
Assault to ravish.....	3	2		1			2		
Assault to rob.....	10	10					10		
Assault with weapon.....	1	1						1	
Bigamy.....	1	1					1		
Burglary.....	40	33	5	2			32		
Burglary and grand larceny.....	58	49	2	5	2		49		
Carnal knowledge.....	3	2	1				2		
Carrying concealed weapon.....	15	5		10				3	2
Conspiracy.....	6	3	1	2				2	1
Defamation.....	1			1					
Distilling.....	95	69	16	10			69		
Driving while intoxicated.....	1	1						1	
Embezzlement.....	11	8	2	1			8		

CIRCUIT COURT OF MONTGOMERY COUNTY— (Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequites.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Escape	2	2					2			
False pretense	12	5		6	1		5	2		
Forgery	31	21		9	1		18	5		
Fraud	1	1								1
Grand larceny	217	157	22	23	15		158			
Grand larceny and embezzlement	3			2	1					
Grand larceny and receiving stolen property	29	18	8	3			16	1		1
Murder	18	13	4	1			13			
Operating slot machine	40	18		22						18
Petit larceny	32	32						19		13
Practicing medicine without license	1	1								1
Presenting firearms	1		1							
Rape	4	1		3			1			
Receiving stolen property	1	1					1			
Reckless driving	8	4		4			1	1		2
Removing property under lien	1		1							
Resisting officer	1	1						1		
Robbery	24	11	8	5			11			
Seduction	1			1						

Sending obscene letter.....	3				3			
Temporary use of auto of another.....	2	2					2	
Temporary use of property.....	6	6					3	3
Transporting five gallons or more of whiskey.....	43	33	1	9		33		
Vagrancy.....	25	10	2	12	1		4	6
Violating narcotic law.....	21	16	1	4		16		
Violating prohibition law.....	163	116	12	31	4		45	77
Totals.....	999	707	91	173	28	1	467	102 3 143

Percentage of convictions, 70.77. Predominant crime, grand larceny.

CIRCUIT COURT OF MORGAN COUNTY

Aiding an escape.....	2				2				
Arson	3		1		1				
Assault	2	2							2
Assault and battery.....	8	8							1
Assault to murder.....	16	8	2		3		3		6
Assault to ravish.....	3				2		1		2
Assault with weapon.....	1	1							1
Attempt to distill.....	24	24							22
Attempt to forge.....	1	1							1
Bastardy	4						4		

CIRCUIT COURT OF MORGAN COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Bigamy	3	1		1	1		1			
Burglary	35	23	1	9	2		18			
Burglary and grand larceny	5	4	1				4			
Carnal knowledge	3	2			1		2			
Concealing stolen property	1	1								1
Disposing mortgaged property	6		3	3						
Distilling	80	44	6	27	3		40			
Embezzlement	4		1	2	1					
False pretense	7	1	4	2			1			
Forgery	17	8	3	3	3		6			2
Grand larceny	43	21	5	11	3		18			2
Kidnapping	2		1	1						
Manslaughter	3	3					3			
Miscegenation	1	1								1
Murder	14	7	4	1			7			
Non-support	1				1					
Perjury	3			3						
Petit larceny	3	3						3		
Rape	2	1	1				1			

Robbery	3	2	1	2	1	2	.....
Seduction	3	.....	3	.....	.....	.....	.....
Transporting five gallons or more of whiskey.....	5	4	1	.....	2	.....	2
Violating revenue law	7	3	4	.....	3	.....	3
Totals.....	315	173	34	79	24	108	44

Percentage of convictions, 54.92. Predominant crime, distilling.

CIRCUIT COURT OF PERRY COUNTY

Abusive language.....	2	2	.....	.....	.....	.....	2
Adultery	3	1	2	.....	.....	.....	1
Assault	1	1	.....	.....	.....	.....	1
Assault and battery.....	10	7	1	2	.....	2	7
Assault and battery with weapon	11	10	1	.....	8	.....	10
Assault to murder.....	5	1	4	.....	1	.....	.....
Attempt to commit burglary.....	1	1	.....	.....	.....	.....	1
Attempt to distill	1	1	.....	.....	.....	.....	1
Bastardy	2	.....	2	.....	.....	.....	.....
Burglary	12	8	3	1	8	.....	.....
Carrying concealed weapon.....	10	5	2	3	.....	2	5
Disposing property under lien.....	1	1	.....	.....	1	.....	.....
Distilling	16	6	3	7	6	.....	.....

CIRCUIT COURT OF PERRY COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to			
						Death.	Peniten- tiary.	Hard Labor.	Jail.
Disturbing religious worship.....	3	2		1					2
Driving while intoxicated.....	1			1					
Embezzlement.....	1	1					1		
Escape.....	1			1					
False pretense.....	4	2	1	1			1		1
Forgery.....	3	2			1		2		
Grand larceny.....	6	3		2	1		3		
Manslaughter.....	2	2					1		1
Miscegination.....	1	1					1		
Murder.....	3	2			1		2		
Permitting still on premises.....	1			1					
Petit larceny.....	6	4		2				3	4
Public drunkenness.....	2			2					
Rape.....	1			1					
Reckless driving.....	3	3							3
Seining.....	1	1							1
Throwing into dwelling.....	1	1						1	
Trespass.....	1			1					
Using auto without owner's consent.....	1	1							1

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Percentage of convictions, 56.25. Predominant crime, distilling.

CIRCUIT COURT OF PICKENS COUNTY

Abusive language.....	4	3	1						3
Aiding felon to escape.....	1		1						
Assault and battery.....	5	4	1					2	2
Assault and battery with weapon.....	5	5							5
Assault to murder.....	2		1	1					
Attempt to distill.....	9	7	1	1					7
Burglary.....	2	2						2	
Burglary and grand larceny.....	19	2	3	14				2	
Carrying concealed weapon.....	3	1	1	1					1
Destroying property.....	1	1						1	1
Distilling.....	5	1	1	3				1	

CIRCUIT COURT OF PICKENS COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Disturbing religious worship.....	2	2								2
Driving while intoxicated.....	4	3		1						3
Embezzlement	2			2						
Grand larceny.....	2	1		1			1			
Murder	5	3	1		1		3			
Opening grave	2		2							
Petit larceny.....	3	3						2		3
Public drunkenness.....	6	2		4						2
Temporary use of auto of another.....	1	1						1		1
Throwing into dwelling.....	1		1							
Violating check law.....	1			1						
Violating highway law.....	3		1		2					
Violating prohibition law.....	12	4		7	1					4
Totals.....	100	45	15	36	4		9	5		34

Percentage of convictions, 45.00. Predominant crime, burglary and grand larceny.

CIRCUIT COURT OF PIKE COUNTY

Abusive language.....	2				1	1		
Assault and battery.....	8	2	5		1		1	1
Assault to murder.....	20	6	9	3	2		5	1
Assault to ravish.....	1	1					1	
Bastardy.....	4	1			2			1
Burglary.....	6	6					6	
Burglary and grand larceny.....	9	5	1	2	1		5	
Conversion.....	1		1					
Disposing mortgaged property.....	2			2				
Distilling.....	14	13	1				13	
Disturbing religious worship.....	4	2	1		1		1	1
Embezzlement.....	1				1			
False pretense.....	6	2	1	2	1		1	1
Forgery.....	8	5	3				5	
Gaming.....	4	2		2				2
Grand larceny.....	14	10	3		1		8	2
Grand larceny and burglary.....	6	5	1				5	
Incest.....	1	1					1	
Interfering with labor.....	1			1				
Larceny.....	3	2			1			2
Larceny and embezzlement.....	1	1					1	
Murder.....	5	4		1			4	
Operating slot machine.....	5			1	4			
Petit larceny.....	4	2		1	1		1	1
Rape.....	1		1					

CIRCUIT COURT OF PIKE COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Reckless driving.....	3	1	1	1	1					1
Seining	5			5						
Transporting five gallons or more of whiskey.....	6	4		2			3	1		
Vagrancy	3		1	2						
Violating check law.....	2	2								2
Violating narcotic law.....	1			1						
Violating prohibition law.....	63	31	8	19	5		8	15		8
Violating revenue law.....	3		3							
Totals.....	217	108	40	48	20		66	24		18

Percentage of convictions, 49.76. Predominant crime, violating prohibition law.

CIRCUIT COURT OF RANDOLPH COUNTY

Abusive language.....	6	6								6
Adultery	2	2								2

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CIRCUIT COURT OF RANDOLPH COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Violating revenue law.....	1	1	1							
Totals.....	98	73	10	13	2		36	6		31

Percentage of convictions, 74.47. Predominant crime, distilling.

CIRCUIT COURT OF RUSSELL COUNTY

Adultery	3	3						2		1
Arson	1	1	1							
Assault and battery.....	7	6	1							6
Assault to murder.....	7	5	1	1			5			
Attempt to distill.....	9	9								9
Bastardy	1	1								1
Bigamy	2	2					2			

Burglary	6	4	1	1	4	1	1	4	1	1	4	1	1	1	1
Burglary of railroad car	2	2	1	1	2	1	1	2	1	1	2	1	1	1	1
Carrying concealed weapon	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Concealing stolen property	2	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Cruelty to animal	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Disposing property under lien	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Distilling	29	25	1	1	3	1	1	25	1	1	25	1	1	1	1
Disturbing religious worship	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Driving while intoxicated	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Embezzlement	3	1	1	1	2	1	1	1	1	1	1	1	1	1	1
Escape	5	4	1	1	1	1	1	4	1	1	4	1	1	1	1
False pretense	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Gaming	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Grand larceny	17	8	2	7	1	1	1	8	1	1	8	1	1	1	1
Keeping gaming table	3	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Manslaughter	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
Murder	5	4	1	1	1	1	1	4	1	1	4	1	1	1	1
Operating slot machine	6	6	1	1	1	1	1	6	1	1	6	1	1	1	1
Petit larceny	4	1	1	2	1	1	1	1	1	1	1	1	1	1	1
Possessing still	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Presenting firearms	2	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Rape	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Reckless driving	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2
Shooting into dwelling	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3
Transporting five gallons or more of whiskey	7	4	3	3	3	3	3	4	3	3	4	3	3	3	3
Vagrancy	8	3	1	4	1	1	1	1	1	1	1	1	1	1	1
Violating check law	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
Violating game law	6	2	2	4	4	4	4	2	2	2	2	2	2	2	2

CIRCUIT COURT OF RUSSELL COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Violating highway law.....	1	1								1
Violating prohibition law.....	54	37	6	11				25		12
Violating road law.....	1			1						
Violating stock law.....	1		1							
Totals.....	211	146	23	42			60	35		51

Percentage of convictions, 69.19. Predominant crime, violating prohibition law.

CIRCUIT COURT OF ST. CLAIR COUNTY

Abusive language.....	15	9	1	5						9
Arson.....	3	1	1		1		1			
Assault and battery.....	16	13		3						13
Assault to murder.....	19	13	3	3			6	5		1

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Percentage of convictions, 61.27. Predominant crime, distilling.

CIRCUIT COURT OF SHELBY COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Abusive language.....	1			1						
Adultery.....	4		2	2						
Arson.....	1		1							
Arson.....	1		1						1	
Assault to murder.....	3	1		2			1			
Assault with weapon.....	6	5		1				3		2
Attempt to distill.....	62	62								62
Attempt to transport liquor.....	1	1								1
Bastardy.....	2	1		1				1		
Bigamy.....	1	1					1			
Burglary.....	7	7					7			
Burglary and grand larceny.....	8	7			1		7			
Carnal knowledge.....	1			1						
Carrying concealed weapon.....	2	1		1						1
Concealing stolen property.....	1	1						1		
Desertion.....	1				1					
Distilling.....	85	42	7	30	6		42			
Driving while intoxicated.....	2			2						
Embezzlement.....	1	1					1			

Forgery	1	1								1			
Grand larceny.....	9	3	3							3			
Incest	1		1										
Manslaughter	7	3	1	3						3			
Murder	13	8	3	2						8			
Petit larceny.....	6	6									2	4	4
Public drunkenness	6	2		4									2
Receiving deposits for bank.....	1	1								1			
Reckless driving.....	1			1									
Robbery	1	1								1			
Transporting five gallons or more of whiskey.....	19	9	2	7	1					9			
Trespass	3			3									
Unlawfully cutting timber.....	1			1									
Vagrancy	1	1									1		
Violating check law.....	2			2									
Violating game law.....	7	2		5									2
Violating prohibition law.....	40	24	4	11	1						3		23
Violating stock law.....	1	1											1
Totals.....	306	188	23	83	10					82	11	5	97

Percentage of convictions, 61.11. Predominant crime, distilling.

CIRCUIT COURT OF SUMTER COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Abusive language.....	3	2	1	1						2
Assault and battery.....	3	3								3
Assault and battery with weapon.....	5	5								5
Assault to murder.....	4	1		3			1			
Attempt to distill.....	3	3					1			2
Burglary.....	10	10					10			
Carrying concealed weapon.....	7	7						2		5
Disposing mortgaged property.....	2	1		1						1
Distilling.....	4	1	1				1			
Grand larceny.....	9	3	3	6			3			
Manslaughter.....	1			1						
Murder.....	4	4					4			
Petit larceny.....	7	7						4		4
Public drunkenness.....	2	1		1						1
Temporary use of auto of another.....	1	1						1		1
Violating check law.....	1			1						
Violating highway law.....	1	1								1
Violating prohibition law.....	5	4	1					1		3

Totals.....	72	54	2	16	20	9	28
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Percentage of convictions, 75.00. Predominant crime, burglary.

CIRCUIT COURT OF TALLADEGA COUNTY

Assault	3	3					3		
Assault to murder.....	3	2		1			2		
Bastardy	2	2					2		
Burglary	9	8	1				8		
Carnal knowledge.....	1	1					1		
Distilling	12	10	1	1			10		
Driving while intoxicated.....	1			1					
Embezzlement	1			1					
False pretense.....	1	1					1		
Grand larceny.....	3	3					3		
Manslaughter	1	1					1		
Murder	4	3	1				3		
Obscene language	2	1		1					1
Petit larceny.....	2	2						1	1
Public drunkenness.....	2	2							2
Receiving stolen property.....	2	2					2		
Reckless driving.....	1	1							1

CIRCUIT COURT OF TALLADEGA COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Robbery.....	1	1					1			
Transporting five gallons or more of whiskey.....	3	2		1			2			
Unlawfully cutting timber.....	1		1							
Vagrancy.....	2	1	1					1		
Violating game law.....	2				2					
Violating prohibition law.....	13	8	3	2				3		5
Violating revenue law.....	1	1								1
Totals.....	73	55	8	8	2		30	14		11

Percentage of convictions, 75.34. Predominant crime, violating prohibition law.

CIRCUIT COURT OF TALLAPOOSA COUNTY

Abusive language.....	3	1	1	1						1
Adultery.....	1	1								1

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CIRCUIT COURT OF TALLAPOOSA COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Reckless driving.....	1	1	1							
Robbery	2	2					2			
Transporting five gallons or more of whiskey.....	2	2					2			
Vagrancy	1	1						1		
Violating check law.....	1	1								1
Violating prohibition law.....	23	15	1	6	1			5		10
Totals.....	187	132	23	32	4		81	13		38

Percentage of convictions, 70.53. Predominant crime, distilling.

CIRCUIT COURT OF TUSCALOOSA COUNTY

Abusive language.....	17	12		5				3		12
Adultery	3	1	1	1						1
Aiding an escape.....	3	2		1				2		

Arson	6	1	1	3	1	1	1	1	1	3
Assault	5	3		2					1	3
Assault and battery	42	27	4	10	1				9	1
Assault and battery with weapon	16	12		4					4	23
Assault to murder	10	9		1				8		10
Assault to rob	1	1						1		1
Assault with weapon	11	4	2	5					1	3
Attempt to distill	45	45							8	45
Bastardy	7		2	5						
Burglary	49	40	3	3				35	5	1
Burglary and grand larceny	4	3		1				2		1
Carnal knowledge	2		1	1						
Carrying concealed weapon	2	2							1	1
Concealing stolen property	3	1			2			1		
Contempt of court	1	1							1	1
Decoying child	1				1					
Defacing public building	5	4		1					2	2
Desertion and non-support	2	1		1						1
Disposing mortgaged property	8	1	3	4						1
Distilling	42	26	5	9	2			26		
Disturbing religious worship	1	1								1
Embezzlement	22	10	1	10	1			10		
Escape	1				1					
False pretense	10	2	1	6	1				1	2
Forgery	25	19		4	2			14	4	3
Gaming	1			1						
Grand larceny	67	50	3	12	2			42	7	
Incest	2		1	1						

CIRCUIT COURT OF TUSCALOOSA COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Injury to property.....	2	2								2
Malicious injury to animal.....	1	1						1		
Malicious injury to property.....	2			2						
Manslaughter.....	6	4	4	1	1		3	1		
Murder.....	10	4	2	2	2		4			
Operating slot machine.....	4			4						
Perjury.....	1			1						
Petit larceny.....	36	32		4				25	4	9
Presenting firearms.....	2	1		1						1
Public drunkenness.....	3	3		3				1		3
Rape.....	2			2						
Receiving stolen property.....	1			1						
Reckless driving.....	3	2		1						2
Resisting officer.....	1	1								1
Seduction.....	1			1						
Shooting along highway.....	2	1		1						1
Transporting five gallons or more of whiskey.....	10	7	1				6	1		
Trespass.....	5	2	1	2						2
Using auto without owner's consent.....	1			1						

Vagrancy	2				2				
Violating game law	3	1	2						1
Violating prohibition law	40	20	8	12				4	1
Violating revenue law	2	1		1					1
Totals	554	360	42	139	13		153	81	9 155

Percentage of convictions, 64.98. Predominant crime, grand larceny.

CIRCUIT COURT OF WALKER COUNTY

Abusive language	15	5	5	3	2				5
Adultery	3	1	2						1
Arson	5		5						
Assault and battery	34	23	2	8	1			1	22
Assault to murder	23	14	5	4			3	4	10
Assault to ravish	5	1	1	2	1				1
Assault with weapon	3	1	2						1
Bastardy	6			4	2				
Bigamy	1			1					
Breach of peace	1			1					
Burglary	3		2		1				
Burglary and grand larceny	26	21	1	3	1		16	2	1
Carnal knowledge	4		1	3					
Carrying concealed weapon	4	1	1	2				1	1
Concealing stolen property	1			1					

CIRCUIT COURT OF WALKER COUNTY—Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Disposing mortgaged property.....	2			2						
Distilling	27	17	2	8			10	1		8
Disturbing religious worship.....	1			1						
Driving while intoxicated.....	6	3		3				1		3
Embezzlement	2	1	1	1				1	1	1
False pretense	5	2	2	1						2
Forgery	5	5					2	2	1	
Fraud	4	2		1	1					2
Gaming	3			3						
Grand larceny.....	39	19	9	10	1		7	4	2	11
Intimidating witness.....	1			1						
Manslaughter	2	1		1				1		
Murder	23	12	7	3	1		12			
Non-support	8	5		3				5		1
Obstructing railroad track.....	1	1								1
Operating slot machine.....	1			1						
Peace proceedings.....	1			1						
Perjury	1				1					
Petit larceny.....	4	2		2					1	2

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Percentage of convictions, 47.68. Predominant crime, violating prohibition law.

CIRCUIT COURT OF WASHINGTON COUNTY

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Abusive language.....	17	10	1	5	1					10
Adultery	1		1							
Assault and battery.....	3	3								3
Assault to murder.....	2	2					2			
Assault with weapon.....	7	4	2	1						4
Attempt to distill.....	5	5								5
Burglary	7	6			1		4	2		
Burning forests.....	2	1		1						1
Carrying concealed weapon.....	7	2	2	3						2
Cruelty to animal.....	1	1								1
Distilling	14	11	2	1			5	5		
Disturbing religious worship.....	1	1								1
Driving while intoxicated.....	3	2	1						1	2
Embezzlement	1	1								
False pretense.....	1		1							
Gaming	3		2		1					
Grand larceny.....	2	2					1	1		
Manslaughter	2	2					2			
Murder	9	5	3	1			5			

Perjury	1	1	7	5	1	1	1	3	6	1	3	6
Petit larceny.....	15											
Presenting firearms.....	1											
Public drunkenness.....	2	1	1									
Reckless driving.....	3	2					1					2
Resisting arrest.....	1						1					
Seduction	1						1					
Shooting along highway.....	1	1										1
Temporary use of property.....	2	2										2
Unlawful injury to animal.....	2							2				
Violating check law.....	4						4					
Violating game law.....	17	8	6				3					8
Violating prohibition law.....	30	15	4	10	1							15
Violating quarantine law.....	15	2	2	11								2
Violating Sunday law.....	2				2							
Totals.....	185	96	32	48	9			19		9	4	66

Percentage of convictions, 51.89. Predominant crime, abusive language.

CIRCUIT COURT OF WILCOX COUNTY

Assault and battery.....	2	2				1
Assault and battery with weapon.....	5	5				2
Assault to murder.....	2			2		

CIRCUIT COURT OF WILCOX COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Proseques.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Peniten- tiary.	Hard Labor.	Jail.	
Assault to ravish.....	1	1					1			
Attempt to distill.....	1			1						
Burglary.....	7	7					7			
Carrying concealed weapon.....	3	3						1		3
Disposing property under lien.....	1	1					1			
Distilling.....	5	4		1			4			
Disturbing religious worship.....	1			1						
Escape.....	1			1						
False pretense.....	1	1					1			
Forgery.....	1	1						1		
Grand larceny.....	9	7	1	1			7			
Juvenile delinquent.....	2			2						
Mansalughter.....	1	1						1		
Murder.....	3	3					3			
Possessing still.....	10	6	2	2			6			
Presenting firearms.....	1			1						
Public drunkenness.....	2	1			1					1
Receiving stolen property.....	2	2						1		1
Violating check law.....	1				1					
Violating prohibition law.....	19	12	2	1	4			8	2	12

Violating quarantine law.....	5	.....	.....	5	.....	.....	.....
Violating road law.....	1	.....	.....	1	.....	.....	.....
Totals.....	87	57	2	18	7	.....	.....
						30	15
							2
							24

Percentage of convictions, 65.51. Predominant crime, violating prohibition law.

CIRCUIT COURT OF WINSTON COUNTY

Abusive language.....	11	8	3				8
Adultery.....	1		1				
Assault and battery.....	9	8	2				7
Assault to murder.....	1		1				
Assault with weapon.....	1						
Attempt to distill.....	3	3					3
Burglary.....	3	3				3	
Carnal knowledge.....	3		3				
Carrying concealed weapon.....	1	1					1
Contempt of court.....	6		6				
Disposing mortgaged property.....	1		1				
Distilling.....	32	19	6			16	1
Disturbing religious worship.....	12	2	10				2
Driving while intoxicated.....	2	2					2
Forgery.....	4	3	1				3

CIRCUIT COURT OF WINSTON COUNTY—(Continued)

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.
						Death.	Penitentiary.	Hard Labor.	Jail.	
Fraud	2		1	1						
Grand larceny.....	2			2						
Manslaughter	1	1						1		
Murder	3	1	1	1			1			
Perjury	1			1						
Petit larceny.....	7	4		2	1					4
Public drunkenness	22	15	1	6						15
Reckless driving	7	3	1	3						3
Resisting arrest	1		1							
Transporting five gallons or more of whiskey	5	4		1			4			
Unlawful injury to property	1			1						
Using auto without owner's consent.....	1	1								1
Vagrancy	2			2						
Violating game law.....	8		7	1						
Violating highway law	1		1							
Violating prohibition law.....	48	37	7	4				7		35
Totals.....	202	115	28	59	1		24	12		83

Percentage of convictions, 59.63. Predominant crime, violating prohibition law.

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